(1)

91-298

No. _____

FILED

AUG 19 1991

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

KENNETH J. ROSA, BRIAN O'CONNOR, GERALD L. NEGRI, HERBERT J. KUPFER AND PRISCILLA CARPENTER, individually and on behalf of all participants and beneficiaries of the City Savings Bank, F.S.B. Minimum Benefit Retirement Plan (formerly, the "City Federal Savings Bank Minimum Benefit Retirement Plan"),

Petitioners,

v.

RESOLUTION TRUST CORPORATION, in its corporate capacity, and as receiver of City Federal Savings Bank, as receiver of City Savings Bank, F.S.B., and as receiver of City Savings, F.S.B.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER B. KAPLAN, ESQ.
Counsel of Record

LAURA V. STUDWELL, ESQ.
On the Brief

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
Woodbridge, New Jersey 07095
(908) 636-8000
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

106

QUESTIONS PRESENTED FOR REVIEW

1. Does 12 U.S.C. § 1821(j) prevent a Court from enjoining conduct of the RTC which is not within the enumerated powers or functions of the RTC under FIRREA, or which is patently unlawful and in violation of statute, or does it merely prevent a court from taking action "to restrain or affect the exercise of the specific powers or functions of the RTC as conservator or receiver"?

2. Does the Administrative Claims Procedure embodied in 12 U.S.C. § 1821(d)(3)-(13), which applies to claims against a "closed depository institution" which arose prior to takeover by the RTC, apply to post-receivership claims arising from the RTC's own conduct after taking over an institution and which are not against the "closed depository institution" and, if so, does such Claims Procedure need to be exhausted even when:

   a) it is demonstrated that pursuing the Claims Procedure for six months before filing a de novo lawsuit would be futile; or,

   b) requiring exhaustion of the Claims Procedure for six months before the very agency which is causing the harm, before filing a *de novo* lawsuit, would cause irreparable harm and a denial of due process by denying access to an Article III Judge at a meaningful time in a meaningful manner.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were plaintiffs Kenneth J. Rosa, Brian O'Connor, Gerald L. Negri, Herbert J. Kupfer and Priscilla Carpenter, in their individual capacities and on behalf of all participants and beneficiaries of the City Savings Bank, F.S.B. Minimum Benefit Retirement Plan (formerly, the "City Federal Savings Bank Minimum Benefit Retirement Plan"); intervenor Pension Benefit Guaranty Corporation ("PBGC"); and defendant Resolution Trust Corporation ("RTC"), in its corporate capacity and as receiver of City Federal Savings Bank, as receiver of City Savings Bank, F.S.B., and as conservator (now receiver) of City Savings, F.S.B.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

A. The Initial Receivership Of City Federal Savings Bank And The Creation Of City Savings Bank, F.S.B. In Conservatorship 2

B. The Minimum Benefit Retirement Plan 3

C. RTC's Initial Take-Over Of City Federal And The Pension Plan, And RTC's Initial ERISA Filings 3

D. The RTC's In-Depth Analysis And Review Of The Plan's Expenses And Funding Requirements 5

E. Formal Adoption And Assumption Of The Trust And Plan In Mid-February 1990 7

F. The Unlawful Attempt Retroactively To "Undo" And Terminate The Plan 8

G. The New "Pass-Through" Receivership And New Conservatorship Of September 21, 1990, And The Liquidation Of New City Savings, F.S.B. 10

H. Jurisdiction Of The District Court 10

TABLE OF CONTENTS – Continued

Page

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT ISSUE OF WHETHER FIRREA, 12 U.S.C. § 1821(j), PREVENTS A COURT FROM ENJOINING CONDUCT OF THE RTC WHICH IS NOT WITHIN THE ENUMERATED POWERS OR FUNCTIONS OF THE RTC 11

POINT II

CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE "CLAIMS PROCEDURE" APPLIES TO POST-RECEIVERSHIP CLAIMS WHICH ARE NOT AGAINST THE "FAILED INSTITUTION" 16

A. The Claims Procedure Governs Only Pre-takeover Claims Against The Failed Institution 16

B. Even If Applicable, Plaintiffs Should Not Be Required To Exhaust The Claims Procedure .. 19

1. Exceptions To Exhaustion Apply Notwithstanding Statutory Exhaustion Requirements 19

2. Exhaustion Of The Claims Procedure Should Have Been Unnecessary 23

3. The Claims Procedure Cannot Prevent Effective, Meaningful Judicial Review Of Patently Unlawful Agency Action 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

281-300 Joint Venture v. Onion, No. 90-5628 (5th Cir. June 12, 1991) 12, 14

Arkansas State Bank Commissioner v. RTC, 745 F. Supp. 550 (E.D. Ark.), *rev'd on other grounds*, 911 F.2d 161 (8th Cir. 1990) 15

Bailey v. Sullivan, 885 F.2d 52 (3d Cir. 1989) 20

Board of Education of City School District v. Harris, 622 F.2d 599 (2d Cir. 1979), *cert. denied sub nom., Hufstedler v. Board of Educ.*, 449 U.S. 1124 (1981) 22

Bowen v. City of New York, 476 U.S. 467 (1986) 19

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 18, 19

Breen v. Selective Service System, 396 U.S. 460 (1970) 21

Central W. Rental Co. v. Horizon Leasing, 740 F. Supp. 1109 (E.D. Pa. 1990) 15

Cervantez v. Sullivan, 719 F. Supp. 899 (E.D. Cal. 1989) 22

City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24 (1934) 22

Coit Independent Joint Venture v. FSLIC, 489 U.S. 561 (1989) ..... *passim*

Dart v. U.S., 848 F.2d 217 (D.C. Cir. 1988) 19

Etelson v. Office of Personnel Management, 684 F.2d 918 (D.C. Cir. 1982) 22

Facchiano v. U.S. Dep't. of Labor, 859 F.2d 1163 (3d Cir. 1988), *cert. denied*, 490 U.S. 1097 (1989) 21

TABLE OF AUTHORITIES – Continued

Page

Fuentes v. Shevin, 407 U.S. 67 (1972) 26

Gibson v. Berryhill, 411 U.S. 564 (1973) 24, 26

Gilley v. United States, 649 F.2d 449 (6th Cir. 1981) 21

Graham v. Caston, 568 F.2d 1092 (5th Cir. 1978) 21

Hummel v. Heckler, 736 F.2d 91 (3d Cir. 1984) 26

In re Murchison, 349 U.S. 133 (1955) 26

Johnson v. U.S. Dept. of Agriculture, 734 F.2d 774 (11th Cir. 1984) 26

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 26

Leedom v. Kyne, 358 U.S. 184 (1958) 19

Manges v. Camp, 474 F.2d 97 (5th Cir. 1973) 20

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 25

New Jersey v. Department of Health & Human Services, 670 F.2d 1262 (3d Cir. 1981) 22

North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975) 26

Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, 693 F.2d 290 (3d Cir. 1982) 23

Rexam Limited Partnership, S.E. v. Resolution Trust Corporation, Civil No. 90-2087 (D.P.R. May 1, 1991) 15

TABLE OF AUTHORITIES – Continued

Page

Senior Unsecured Creditors' Committee of First Republic Bank Corporation v. FDIC, 749 F. Supp. 758 (N.D. Tex. 1990) 19

Stark v. Wickard, 321 U.S. 288 (1944) 25

Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) 21

The Rechler Partnership v. RTC, No. 90-3091 (D.N.J. September 4, 1990) 15

United States ex rel. Marrero v. Warden, 483 F.2d 656 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 653 (1974) 22

Weinberger v. Salfi, 422 U.S. 749 (1975) 22

Wilkerson v. Bowen, 828 F.2d 117 (3d Cir. 1987) 20

Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983) 26

Withrow v. Larkin, 421 U.S. 35 (1975) 26

STATUTES

12 U.S.C. § 1821(d)(3)-(13) ..... *passim*

12 U.S.C. § 1821(j) ..... *passim*

OTHER AUTHORITIES

1989 U.S. Code Cong. and Admin. News, Vol. 2 (1989) 18

OPINIONS BELOW

The United States District Court for the District of New Jersey issued its Opinion and Order granting a preliminary injunction against the RTC on December 5, 1990 in *Kenneth J. Rosa, et al. v. Resolution Trust Corporation*, 752 F. Supp. 1231 (D.N.J. 1990) (annexed hereto as Appendix A).

The United States Court of Appeals for the Third Circuit thereafter reversed the District Court's Order in a decision filed June 27, 1991, No. 90-6010 (annexed hereto as Appendix B).

STATEMENT OF JURISDICTION

The decision for which petitioners seek review was filed on June 27, 1991 by the United States Court of Appeals for the Third Circuit. This Court has jurisdiction to review the decision of the Third Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

12 U.S.C. § 1821(j) provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation [RTC] as a conservator or receiver.

The Claims Procedure embodied in FIRREA, 12 U.S.C. §§ 1821(d)(3) through (13), is reproduced in the Appendix annexed hereto as Appendix C.

STATEMENT OF THE CASE

A. The Initial Receivership Of City Federal Savings Bank And The Creation Of City Savings Bank, F.S.B. In Conservatorship

On December 7, 1989, the Director of the Office of Thrift Supervision ("OTS"), Department of the Treasury, ordered that City Federal Savings Bank ("City Federal") be closed, and that the RTC be appointed Receiver and take possession of City Federal (OTS Order No. 89-460, JA 427-428).[1] To support this order, pursuant to 12 U.S.C. § 1464(d)(2)(A)(ii), (iii), (vii) and (viii), the OTS found that there existed "unsafe and unsound practices and conditions," "dissipation of earnings," the "depletion of capital," and potential "insolvency" at the bank (OTS Order No. 89-460, JA 427). The City Federal receivership was what is known as a "pass-through" receivership because, on that same day, OTS created City Savings Bank, F.S.B. ("City Savings Bank") (OTS Order No. 89-461, JA 434-435), with RTC as Conservator (OTS Order No. 89-462, JA 436-437), which assumed the assets and certain liabilities of City Federal pursuant to a "Purchase And Assumption Agreement" dated December 8, 1989

[1] The Joint Appendix filed in the Third Circuit is referred to as "JA"; Appellees' Supplemental Appendix is referred to as "ASA"; the Verified Complaint is referred to as "Ver. Compl."

(JA 438-488). The employees of City Federal then became employees of the new entity, City Savings Bank. *Id.*

B. The Minimum Benefit Retirement Plan

At the time of the RTC takeover of City Federal, the Bank had sponsored and maintained, since 1985, a Minimum Benefit Retirement Plan (the "Pension Plan") (ASA 1-100) and Trust Agreement (ASA 101-157), to provide "retirement benefits and certain other benefits to eligible employees of the Bank . . . and thereby to encourage employees to make and continue careers with the Bank" (Ver. Compl. Exh. A at 2, ASA 4). The Plan contained mandatory Minimum Funding Contribution requirements (Ver. Compl. Exh. A at Section 12.1, ASA 64), and prohibited any amendment or modification which would retroactively impair any rights to any benefits under the Plan (Ver. Compl. Exh. A at Section 15.1(b), ASA 73).

C. RTC's Initial Take-Over Of City Federal And The Pension Plan, And RTC's Initial ERISA Filings

One day after RTC's takeover of City Federal, on December 9, 1989, Jack P. Shinn, RTC's on-site Managing Agent of City Federal and City Savings Bank, met with Jeffrey J. Kaplowitz, City Federal's Executive Vice President in charge of Human Resources, to discuss the various employee benefit plans and the plans that RTC would assume (Kaplowitz Tr. 16-19, JA 613, 616). During that meeting, Shinn noted that, although the RTC had the right to repudiate or abrogate the Pension Plan (Kaplowitz Tr. at 18-19, JA 615-616),

> [i]t was [Shinn's] mission to run this new bank, City Savings Bank, F.S.B. as an ongoing entity, to maximize its value for sale for the RTC . . . and, as such, [Shinn] intended to continue all benefits to employees that were in existence on the day before the RTC came in. (Kaplowitz Tr. at 18, JA 615).[2]

Two days later, on December 11, 1989, Shinn distributed a memorandum to all employees which stated: "Employees are the essence of our business. We need you to continue our operations. City Savings is maintaining all of City Federal's benefits programs, except for the Employee Stock Ownership Plan" (Ver. Compl. Exh. C, ASA 158-159; Exh. P-25, JA 515). Shinn testified that the purpose of this memorandum "was to commence to gain their [the employees'] loyalty, their confidence, to alleviate their anxieties and fears and to seek their cooperation" (Shinn Tr. at 30, JA 748).

---

[2] Under 12 U.S.C § 1441a(b)(1)(C), the FDIC is the "exclusive manager" of the RTC, and a 1989 FDIC "Financial Institution Employee Plan Procedures" Manual, sets forth specific procedures to be followed to terminate or continue a failed institution's ERISA Pension Plan (Exh. P-1, JA 196-277). That Procedures Manual provides:

> If a successor financial institution will employ a significant number of the receivership financial institution's employees . . . the successor financial institution may want the FDIC to let it assume the plan. . . . Because the assumption can aid employee morale (and thus the success of the successor financial institution), the FDIC may want to encourage assumption of an existing plan. (Exh. P-1 at 7, JA 215).

On December 21, 1989, Shinn directed that a "Benefits" Memorandum (Ver. Compl. Exh. D, ASA 160-161; Exh. P-26, JA 517) be sent to all employees, which specifically stated that the Pension Plan "continue[s] unchanged with service from City Federal bridged to City Savings" (Ver. Compl. Exh. D at 2, ASA 161) (Shinn Tr. at 39-40, JA 757-758) (Kaplowitz Tr. at 20-24, JA 617-621). *See also* Memorandum of December 26, 1989 (Exh. D-1, JA 888); and Kaplowitz Tr. at 29 (JA 626).

On January 8, 1990, RTC's Managing Agent, Shinn, forwarded a "Notice of Reportable Event" (Exh. P-9, JA 307) to the Pension Benefit Guaranty Corporation ("PBGC") which stated that City Savings "agreed to assume, honor and perform [the] obligations under the Minimum Benefit Retirement Plan [and that] the Plan was therefore assumed by City Savings, effective December 8, 1989" (Exh. P-9 at 3, JA 309) (Shinn Tr. at 46, JA 760; Kaplowitz Tr. at 31-32, JA 628-629).

D. The RTC's In-Depth Analysis And Review Of The Plan's Expenses And Funding Requirements

Between December 8, 1989 and February 1, 1990, the RTC conducted an in-depth review of the expense and funding requirements of the Pension Plan. Thus, a December 26, 1989 Memorandum initially noted that "termination of the ESOP will likely result in additional funding obligations" beyond the $1 million scheduled for 1989 (Exh. D-1 at 5, JA 800) (Kaplowitz Tr. at 29, JA 626). Thereafter, based on a study by the Plan's actuaries, TPF&C, a January 22, 1990 Memorandum (Exh. D-2 at 2-3,

JA 802-803), and a January 26, 1990 report from the actuaries (Exh. P-2 at 3-4, JA 280-281) set forth the revised "Expense" and "Funding" requirements for the Plan of $2,718,957 (Exh. P-2 at 3, JA 280) and $3.213 million (P-2 at 4, JA 281), respectively (Kaplowitz Tr. at 42-46, JA 639-643).

During this same period of time; in mid-December 1989, the Assistant Deputy Director of RTC's Eastern Regional Office in Atlanta (Sandra A. Waldrop, to whom Shinn reported) assigned an RTC Pension Plan Expert, Alan Y. Robertson, to come to New Jersey to do an in-depth review and analysis of the bank's Pension Plan, 401-K Plan, and Thrift Plan (Shinn Tr. at 47-48, JA 761-762); (Kaplowitz Tr. at 33-35, JA 630-632). As part of that review and analysis, Robertson's January 18, 1990 Memorandum (Ver. Compl. Exh. E, ASA 162-164; Exh. P-27, JA 519) concurred in the adoption and increased funding requirements of the Plan (Ver. Compl. Exh. E at 2, ASA 163; Exh. P-27 at 2, JA 519). *See also* January 24, 1990 Memorandum ("with the concurrence of the RTC . . . [a]ll of [the] actions are on target as discussed in previous meetings" (Exh. P-32, JA 580)).

On January 30, 1990, Shinn and his staff met specifically to review and discuss the revised 1990 "Expense" number for the Plan of $2,718,857, and the revised "Funding" schedule for the Plan totalling $3,212,678, as set forth in the Memorandum of January 22, 1990 (Exh. D-2, JA 801) and in the actuaries' report of January 26, 1990 (Exh. P-2, JA 278). At that meeting, the costs for the Plan were approved (Kaplowitz Tr. 84-85, JA 681-682). Two days later, in a February 1, 1990 Memorandum (Exh. P-31, JA 576), and attachments (Exh. P-27, JA 519; and Exh.

P-32, JA 580), Shinn advised his superior at RTC-Atlanta as to the steps being taken with respect to the Pension Plan.

Shinn was then transferred back to Atlanta and was succeeded by Brian H. McClelland (who had previously been the Assistant Managing Agent on site). In early February 1990, in various memoranda and meetings, RTC's new Managing Agent, McClelland, was fully advised as to the January 30, 1990 meeting, the results of the meeting, was given the revised "Expense" and "Funding" requirements for the Plan, and he fully agreed with the decision to adopt and assume the Pension Plan (Kaplowitz Tr. 54-58, 59-60 and 86-87, JA 651-655, 656-657 and 683-684) (Exh. P-3, JA 283; Exh. P-4, JA 289; Exh. P-5, JA 291) (*see also* Exh. P-10, JA 310).

E. Formal Adoption And Assumption Of The Trust And Plan In Mid-February 1990

Thus, it was only after RTC's Managing Agents and Pension Expert on site had full knowledge of the actuaries' revised Expense and Funding Requirements for the Plan, and only after RTC-Atlanta was notified of the action taken, that McClelland, RTC's then-Managing Agent, formally executed the Trust Amendment on February 9, 1990 (Ver. Compl. Exh. F, ASA 165-168; Exh. P-6, JA 293-295), and the Plan Amendments on February 12, 1990 and March 1, 1990 (Ver. Compl. Exh. G and H, ASA 175-178 and 179-181; Exh. P-7 and P-8, JA 297-302, 303-306), pursuant to which the Pension Trust and Plan were formally adopted and assumed by RTC for City

Savings Bank. Indeed, those amendments specifically evidence the fact that they were formally adopted and entered into pursuant to the full and complete authority of the RTC (*Id.*) (*see* Kaplowitz Tr. at 63-64, JA 660-661; Opinion at 18, JA 902).

Thereafter, in March 1990, RTC provided the necessary ERISA notices and filings with the IRS and PBGC establishing the assumption of the Plan (Ver. Compl. Exh. I, ASA 179; Exh. P-11, JA 890). Indeed, in January and April 1990, City Savings Bank made the required quarterly contributions to the Plan totalling $286,853 (*see* JA 890-891; Exh. P-2, JA 278-281; Exh. D-2, JA 801-803).

F. The Unlawful Attempt Retroactively To "Undo" And Terminate The Plan

In June and July 1990, RTC had effectively abandoned its prior plan to try to sell City Savings Bank intact as a "going concern," and began informing employees that the Bank would be liquidated and resolved (*see* Exh. P-34, JA 585; Exh. P-35, JA 586; Kaplowitz Tr. at 89-90 and 91-94, JA 686-687 and 688-691). It was in this context that RTC's attorney asked the Pension Plan's actuaries to provide a June 4, 1990 letter setting forth the Funding requirements: (a) if the Plan was continued as an ongoing plan, (b) if it was terminated July 1, 1990, or (c) if benefits were frozen as of July 1, 1990 (Exh. P-13, JA 317). Indeed, the Funding contribution figures in that letter reflected the *very same* contribution numbers provided by the actuaries in January 1990 (*see* Exh. P-2, JA 278).

Thereafter, in a July 5, 1990 Managing Agents Committee Meeting, "freezing" the Plan was discussed (*see*

Exh. P-36, JA 587) (Agenda and Minutes), with no mention of any "retroactive" termination. The Agenda and Minutes of the July 12, 1990 meeting (Exh. P-37, JA 590) show that the Pension Plan was not even on the Agenda for the July 12, 1990 meeting (*see* Exh. P-37, JA 590), and the minutes reflect only that, "The Committee unanimously concurred *to return the Plan to the Receivership.*" (Exh. P-37, JA 592) (emphasis added).

Thus, at a point in time when RTC was then-planning to liquidate and resolve the bank by year-end (rather than sell it as a "going concern"), without any reports, studies, analyses, or consultants, without it even being an Agenda item, and based on the *very same* funding requirements that the RTC had studied six months earlier, on July 12, 1990 RTC decided simply to "undo" the prior express assumption of the Plan, and retroactively to "return the Plan" to City Federal, which no longer existed, as if the assumption never occurred.

On July 13, 1990, RTC's attorney instructed the Plan Administrator (Kaplowitz) not to make any further contributions to the Plan (Ver. Compl. Exh. J and K, ASA 182-184; Exh. P-14, JA 322; Exh. P-15, JA 323) (Kaplowitz Tr. at 111-12, JA 708-709). Indeed, on August 24, 1990, RTC removed the Plan Administrator and appointed itself (through its attorney) Plan Administrator (Ver. Compl. Exh. Q at 2, ASA 195; Exh. P-19, JA 425), and continued to fail to make the required Plan contributions. As a result, the Second and Third Quarterly Contributions for 1990 (totalling $552,344) were not made, and the final payment for 1989 (of $2,110,809) was also not made (*see* Exh. P-2 at 4, JA 218).

RTC then published Notices announcing that *City Federal* – rather than City Savings, which had assumed the Plan – would retroactively terminate the Plan on September 20, 1990, with all benefit accruals ceasing as of ten months earlier, on December 8, 1989 (Ver. Compl. Exh. N and M, ASA 185-186, 187-190; Exh. P-16 and P-17, JA 325 and 326) (*see* also Ver. Compl. Exh. O, ASA 194-196).

G. The New "Pass-Through" Receivership And New Conservatorship Of September 21, 1990, And The Liquidation Of New City Savings, F.S.B.

As noted above, the Notices of Termination stated that, on September 20, 1990, RTC would retroactively terminate the Pension Plan effective as of December 8, 1990. (Ver. Compl. Exh. L, M and O, ASA 184-192). On September 21, 1990, City Savings Bank was placed in yet a new "pass-through" Receivership (OTS Order Nos. 90-1762 and 1763 of September 21, 1990, Exh. P-24, JA 489-493) and its assets and certain liabilities were simply transferred to yet a new entity created on that date, City Savings, F.S.B. ("New City Savings") (OTS Order Nos. 90-1764 and 1765, Exh. P-24, JA 494-495, 506-514), pursuant to yet a new "Purchase and Assumption Agreement" of September 21, 1990 (Exh. P-30, JA 529-575). Thereafter, the new entity (New City Savings) was liquidated and resolved in January 1991.

H. Jurisdiction Of The District Court

The United States District Court for the District of New Jersey had federal question jurisdiction over this matter pursuant to ERISA §§ 409 and 502, 29 U.S.C.

§§ 1109 and 1132, pursuant to Section 501 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1441a, and pursuant to 28 U.S.C. §§ 2201, 2202 and 1331.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT ISSUE OF WHETHER FIRREA, 12 U.S.C. § 1821(j), PREVENTS A COURT FROM ENJOINING CONDUCT OF THE RTC WHICH IS NOT WITHIN THE ENUMERATED POWERS OR FUNCTIONS OF THE RTC

This petition concerns an issue of national importance regarding a Court's ability to enjoin conduct of the RTC which is not within the "powers or functions" of the RTC under FIRREA and, indeed, which is expressly and patently prohibited by another federal statutory scheme – ERISA. Thus, the present action does not seek to restrain or affect the RTC's power or discretion in assuming the Plan, but rather concerns the legal duties and obligations which attach under ERISA *as a result* of the RTC's exercise of its powers and functions under § 1821(j). Indeed, the RTC has never cited to *any provision* of FIRREA which gives the RTC "as conservator or receiver" the "power or function" to "undo" and "return" a fully-assumed contract to the failed bank as if the assumption *never occurred*.[3]

---

[3] As the District Court concluded,

> nothing in FIRREA expressly allows the RTC to retroactively reject a fully assumed pension plan. Once

(Continued on following page)

Although the Third Circuit was unable to refer to any statutory power of FIRREA which permitted the RTC to retroactively terminate the Plan, after it had been formally assumed by the RTC, the Third Circuit nonetheless held that the purpose of § 1821(j) would be "undermined" by upholding the grant of injunctive relief against the RTC (Appendix B at 49). However, such a holding is not only inconsistent with the recent Fifth Circuit decision in *281-300 Joint Venture v. Onion*, No. 90-5628 (5th Cir. June 12, 1991), but is contrary to this Court's holding in *Coit Independent Joint Venture v. FSLIC*, 489 U.S. 561 (1989).

The Third Circuit held that, because the RTC was purportedly empowered to deal with any employee and personnel matters, 12 U.S.C. § 1821(j) prevented *any injunction* concerning any such matter, no matter how unlawful or harmful, and even though no provision of FIRREA authorized the RTC's unlawful conduct. Under the Third Circuit's approach, if the RTC's Managing Agent sought to impose corporal punishment for employee transgressions, no injunction could issue to prevent it because it deals with personnel matters; and, indeed, the employee's sole remedy would be to pursue the Administrative Claims Procedure for six months before obtaining any hearing before an Article III Judge.

(Continued from previous page)

the RTC has assumed a plan, it must be subject to the laws that control that contractual obligation, namely ERISA. To find otherwise would make the RTC completely immune from any judicial review and arbiter of its own actions. (Appendix at 12, JA 896-897).

Thus, the Third Circuit framed the § 1821 issue incorrectly. The issue is *not* whether the RTC was empowered to deal with employee or personnel matters. Rather, the issue was whether any provision of FIRREA authorized the RTC retroactively to "return a contract to the Receiver" after it was expressly and formally assumed and accepted by the successor Conservator entity.

In *Coit, supra*, the Supreme Court dealt with statutory language identical to § 1821(j), in 12 U.S.C. § 1464(d)(6)(C), as to the RTC's predecessor, the FSLIC. In *Coit*, the Supreme Court unanimously held that, in order to determine whether the "restrain or affect" prohibition contained in § 1464(d)(6)(C) applied, the Court would first have to determine if the suit would "restrain or affect" a *specific*, enumerated "power or function" of the agency as "a conservator or receiver." In that case, the Supreme Court held that the statute,

> simply prohibits courts from restraining or affecting FSLIC's exercise of [its] receivership 'powers and functions' *that have been granted by other statutory sources*. (*Id.*, 109 S.Ct. at 1369).

Although the Third Circuit ignored this analysis, the *Coit* analysis should have applied in the present case in that there is no statutory provision of FIRREA which gives the RTC the "power or function" retroactively to "undo" and return an obligation to the failed receivership institution after it has been fully assumed by the successor, Conservatorship entity.

Indeed, in *Coit*, this Court also noted that Congress did not seek to prevent all suits or remedies against the FSLIC, in that the statute provided that the FSLIC could "sue and be sued, complain and defend, in any court of

law or equity." Congress adopted virtually identical "sue and be sued" provisions as to the RTC, under 12 U.S.C. § 1441(b)(10)(F).[4]

The *Coit* analysis was recently applied in *281-300 Joint Venture v. Onion*, No. 90-5628 (5th Cir. June 12, 1991), thereby creating a split in the Circuits. In *Onion*, the Court denied plaintiff's application for an injunction seeking to enjoin the RTC from conducting a foreclosure, holding that the "foreclosure was within the statutorily authorized powers of the RTC as conservator" under § 1821(j). Slip Opinion at p. 5. In so holding, the Court referred to *Coit* for the proposition that a court may not grant injunctive relief unless the power or function sought to be enjoined is *beyond the power granted to the RTC by statute*. (Emphasis added). Slip Opinion at 5; *Coit, supra*, at 574. Thus, the Court in *Onion* stated that the function under consideration – the ability of the conservator to foreclose on the property of a debtor – was an

---

[4] Moreover, in *Coit*, the Supreme Court explained that the FSLIC "is often the main creditor against the assets of a failed savings and loan association" – just as the RTC is – and thus "may well have an incentive" to act in its own interest. *Id.*, 109 S.Ct. at 1375.

Similarly, in the present case, the RTC had the incentive to withhold the Plan contributions so that, after being subrogated to the claims of the depositors and creditors which were paid out, the RTC, as the main creditor of the failed institution, could recover such monies – monies which were wrongfully withheld from the Plan. *See* 12 U.S.C. §§1821(g)(1) and (i)(3), which subrogate RTC to the rights of depositors and creditors it pays, and §1821(D)(11) which then gives RTC a priority claim as to those subrogated rights.

"express power" that Congress gave to the RTC under FIRREA. *Id.*

Similarly, in *Central W. Rental Co. v. Horizon Leasing*, 740 F. Supp. 1109 (E.D. Pa. 1990), the Court held that, under 12 U.S.C. § 1821(j), it was "not statutorily prohibited from granting injunctive relief." *Id.* at 1110. The Court there, as did this Court in *Coit*, examined the specific "powers and functions" of the RTC "as conservator or receiver" and held that the relief did not "restrain or affect" any power or function specifically granted to the RTC as conservator or receiver, and further concluded that, "plaintiff may pursue its present suit and if warranted by the law and facts, this court may enjoin defendant [RTC]." *Id.* at 1113. *See also Arkansas State Bank Commissioner v. RTC*, 745 F. Supp. 550, 556 n.4 (E.D. Ark.), *rev'd on other grounds*, 911 F.2d 161 (8th Cir. 1990) ("[t]his Court cannot . . . accept the proposition that this prohibition [in § 1821(j)] is applicable where a court has found that the RTC exceeded its authority in the exercise of its function"); *Rexam Limited Partnership, S.E. v. Resolution Trust Corporation*, Civil No. 90-2087 (D.P.R. May 1, 1991) (Court rejected the RTC's argument that § 1821(j) gave it "unrestrained power" and granted plaintiff's motion for summary judgment which ordered the RTC to fulfill its contractual obligations to plaintiff); *The Rechler Partnership v. RTC*, No. 90-3091 (D.N.J. September 4, 1990).

This Court's decision in *Coit*, interpreting § 1464(d)(6)(C), and the authorities discussed above, demonstrate that the RTC's attempt retroactively to "undo" and "revoke" its express assumption of the Plan does not fall within § 1821(j) because it is not the exercise of any "power or function" given to the RTC by FIRREA.

This Court should thus grant petitioners' application for certiorari to bring the Third Circuit's interpretation of 12 U.S.C. § 1821(j) in accord with that of this Court, as well as that of the Fifth Circuit.

POINT II

CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE "CLAIMS PROCEDURE" APPLIES TO POST-RECEIVERSHIP CLAIMS WHICH ARE NOT AGAINST THE "FAILED INSTITUTION"

A. The Claims Procedure Governs Only Pre-take-over Claims Against The Failed Institution

In rendering its decision that the Administrative Claims Procedure of FIRREA is a jurisdictional bar to petitioners' post-receivership claims arising from RTC's *own conduct* after intervention, the Third Circuit focused on three words of § 1821(d)(13)(D) – a sub-section of the Claims Procedure – and failed to address or consider the remaining sections of the Procedure, as well as the Legislative History, which demonstrate that the Claims Procedure is only applicable to *pre-receivership* claims against the *failed institution*. Rather than consider and construe the statute as a whole, the Third Circuit focused on only isolated phrases in § 1821(d)(13)(D)(i) and (ii) to support its holding that the Procedure applies to claims against "any" depository institution, including those which may be created by the OTS *after* the failure of the original institution (Appendix B at 35).

A review of the *entire* Claims Procedure demonstrates that it does not apply to petitioners' claims in this case

because the Procedure relates solely to claims for money (or to enforce security interests) against the *"failed institution"* which arose prior to the takeover by RTC, and not claims which arose against the *Conservatorship* or against RTC *as Conservator* after the takeover. Thus, for example, the "Notice Requirements" under § 1821(d)(3)(B) relate to notice being given to the creditors of the *"failed institution"* – *i.e.*, before the takeover by RTC – as reflected on the failed institution's pre-takeover "books and records." The other subsections of § 1821(d)(3), *et seq.*, similarly make it apparent that the Claims Procedure applies only to claims for payment of money (or to enforce security interests) asserted by the "creditors" or other "claimants" of the "failed institution" which arose *prior* to the RTC takeover. *See, e.g.*, §§ 1821(d)(3)(C), (5)(D), (8)(A), (B) and (C), (10)(A) and (B).[5]

As the Court in *The Rechler Partnership v. RTC*, Civil No. 90-3091 (D.N.J. September 4, 1990) noted:

> The language of the administrative claims procedure explicitly indicates that it was designed to address pre-Receiver claims against the failed depository institution and not post-Receiver [claims] against RTC. . . .
>
> Congress vested in RTC, in the first instance, the power to adjudicate claims by creditors *against the failed institution*. This procedure was

---

[5] Thus, for example, the subsection governing "expedited determination of claims," under § 1821(d)(8)(A), relates only to claims against the "failed institution" alleging "the existence of a legally valid and enforceable or perfected security interest in assets of [the] depository institution for which [RTC] has been appointed receiver" – completely inapplicable to plaintiffs' claims here.

> designed to "dispose of the bulk of claims *against failed financial institutions* expeditiously and fairly." House of Representatives Report No. 101-54, 101st Congress, 1st Session, page 419. (*Rechler* Opinion, *supra*, at 4.5 and 4.6) (emphasis added).

Indeed, application of the Claims Procedure to first require RTC to pass on claims *against itself* for *its own* conduct *as Conservator* occurring after the takeover of an institution by RTC was plainly not intended by Congress in enacting the Claims Procedure. *See* House Rep. No. 101-54(I) at 418-419, *reprinted in* Vol. 2, 1989 *U.S. Code Cong. and Admin. News* 86, at 214-215 (1989), stating that the Claims Procedure was intended to cure the procedural deficiencies found four months earlier in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 572-573 (1989), in which the Supreme Court noted that, under the claims process, Congress merely provided *"the traditional powers of a receiver"* to allow or disallow claims against a failed institution – "traditional powers" which do *not* include the ability or power to pass upon *one's own* unlawful conduct *after* takeover of a failed institution. The fact that the Claims Procedure under § 1821(d)(3), *et seq.*, is administered only by RTC "as receiver" of the failed institution, and not as conservator of the successor entity, further confirms this reading of the statute.

Moreover, absent clear, convincing and unambiguous legislative intent, the statutory presumption favors judicial review of the RTC's conduct. For example, in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-671 (1986), the Supreme Court held:

> We begin with the strong presumption that Congress intends judicial review of administrative action. . . .
>
> "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the court restrict access to judicial review." *Abbott Laboratories*, 387 U.S. at 141.

See Dart v. U.S., 848 F.2d 217, 223 (D.C. Cir. 1988) ("[t]he presumption of judicial review is particularly strong where an agency is alleged to have acted beyond its authority"); *Senior Unsecured Creditors' Committee of First Republic Bank Corporation v. FDIC*, 749 F. Supp. 758, 765 (N.D. Tex. 1990) ("every court to consider the issue . . . has implicitly or explicitly found a right of review" of FDIC action).[6]

B. Even If Applicable, Plaintiffs Should Not Be Required To Exhaust The Claims Procedure

1. Exceptions To Exhaustion Apply Notwithstanding Statutory Exhaustion Requirements

In *Bowen v. City of New York*, 476 U.S. 467, 485 (1986), the Supreme Court recognized an exception to the statutory "withdrawal of jurisdiction" contained in the Social Security Act, where exhaustion would have been "futile," and where the agency conduct at issue "was inconsistent

---

[6] *See also Bowen v. Michigan Academy of Family Physicians*, *supra*, 476 U.S. at 681 ("We ordinarily presume that Congress . . . expects the courts to grant relief when an executive agency violates [a statute]"); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958) (Congress favors "judicial protection of rights it confers against agency action taken in excess of delegated powers").

in critically important ways with established regulations." *See also Bailey v. Sullivan*, 885 F.2d 52, 65 (3d Cir. 1989) (court rejected exhaustion requirement under statute requiring exhaustion, and held that "practical considerations militat[e] against the requirement that claimants go through the motions of administrative review when a court is addressing a claim that the agency applie[d] an illegal standard"); *Wilkerson v. Bowen*, 828 F.2d 117, 121-22 (3d Cir. 1987) (exhaustion not required, notwithstanding statutory requirement, where plaintiffs alleged that agency "ignor[ed] binding court precedent and a legislative mandate").

Similarly, in *Manges v. Camp*, 474 F.2d 97, 99 (5th Cir. 1973), the Court held that, even when a section of the FDI Act (12 U.S.C. § 1818(i)) purported to withdraw jurisdiction over agency action, federal courts have inherent authority to determine whether an agency has acted unlawfully:

> There is, however, a very strong court created exception to withdrawal [of judicial review] statutes. This exception comes into play when there has been a clear departure from statutory authority, and thereby exposes the offending agency to review of administrative action otherwise made unreviewable by statute. . . .
>
> [N]o one, we believe, suggests that [the withdrawal section of the statute] can sustain a literal reading. . . . Examples are legion where literalness in statutory language is out of harmony either with constitutional requirements or with an Act taken as an organic whole. (*Quoting Oesterich v. Selective Service System*, 393 U.S. 233, 238 (1968)).

See also Breen v. Selective Service System, 396 U.S. 460, 467 (1970) ("clear departure from statutory mandate . . . justified judicial review"); *Graham v. Caston*, 568 F.2d 1092, 1097 (5th Cir. 1978) (if agency "clearly departs from statutory authority, [it] is subject to judicial review even though a jurisdictional withdrawal statute is otherwise applicable").

Similarly, when the administrative procedure does not provide for the statutory remedy sought, exhaustion will not be required notwithstanding a statutory requirement for exhaustion. *Coit v. FSLIC*, *supra*, 489 U.S. at 587 (even when statute requires exhaustion, "[a]dministrative remedies that are inadequate need not be exhausted"); *Gilley v. United States*, 649 F.2d 449, 453 (6th Cir. 1981) ("[c]ourts will not infer that the enactment of a particular statute containing provisions [withdrawing] judicial review has the effect of withdrawing from the courts their traditional equitable powers").

In, for example, *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 242-245 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), the Court rejected a "statutorily mandated jurisdictional exhaustion requirement" where plaintiffs alleged a violation of another federal statute which provided for private equitable and remedial relief, and where such remedies were unavailable before the agency. The exceptions to exhaustion in *Susquehanna* were recently applied in *Facchiano v. U.S. Dep't. of Labor*, 859 F.2d 1163, 1167-68 (3d Cir. 1988), *cert. denied*, 490 U.S. 1097 (1989).

Thus, notwithstanding a statute, when the agency has been steadfast in refusing to acknowledge the

validity of a party's claim, exhaustion will similarly be excused as "futile." For example, in *New Jersey v. Department of Health & Human Services*, 670 F.2d 1262, 1277-78 (3d Cir. 1981), the Court held that, when it was "quite clear" what the agency's legal posture was, and that there was "nothing in the record [to] even remotely indicate" that it might adopt any other position, exhaustion would not be required. *See also Etelson v. Office of Personnel Management*, 684 F.2d 918, 925 (D.C. Cir. 1982) (exhaustion held not required where agency had "demonstrated that it [wa]s unlikely to afford [plaintiff] relief"); *Board of Education of City School District v. Harris*, 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied sub nom. Hufstedler v. Board of Educ.*, 449 U.S. 1124 (1981) ("resort to the agency would plainly be unavailing in light of its manifest opposition," where it "fully briefed and hotly contested" appellees' claim and "challenged the propriety of the district court's issuance of injunctive relief," and thus "it ill behooves [the agency] under these circumstances and at this stage of the proceedings" to argue that the administrative process should have been pursued); *Cervantez v. Sullivan*, 719 F. Supp. 899, 907 (E.D. Cal. 1989) (given the agency's "vigorous defense . . . it stretches credulity to suggest that the [agency] would reverse [its] position . . . in the course of an administrative proceeding").[7]

---

[7] *See also Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24 (1934); *United States ex rel. Marrero v. Warden*, 483 F.2d 656, 659 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 653 (1974).

2. Exhaustion Of The Claims Procedure Should Have Been Unnecessary

The foregoing cases demonstrate that "exhaustion" is not required when "the nonjudicial remedy is clearly shown to be inadequate to prevent irreparable injury," "resort to the nonjudicial remedy would clearly and unambiguously violate statutory or constitutional rights," or "exhaustion would be futile." *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290, 293 (3d Cir. 1982).

Prior to commencing the present action, petitioners made demand on RTC that it rectify the violations, which RTC steadfastly refused to do (Ver. Compl. Exh. S). Moreover, in every brief and in every court filing, the RTC has steadfastly and vigorously denied the validity of petitioners' claims, and has denied *any* responsibility for funding the Pension Plan. Thus, the RTC's consistent refusal to comply with ERISA makes clear that any application by petitioners to the RTC prior to the commencement of this lawsuit, under the Claims Procedure, would have been rejected, and would have resulted only in a waste of time, effort and resources. In sum, it simply would have been futile to have first asked the RTC to pass on the propriety of *its own conduct*, when it has previously vigorously denied *any* responsibility or impropriety in such conduct.

Moreover, even if petitioners had followed the Claims Procedure and had prevailed, they would still have received only a "Receiver's Certificate" against an assetless entity. Under the Claims Procedure, the RTC "as receiver" has the power only "to allow or disallow" a

money claim or security interest (*see* §§ 1821(d)(5)(A)(i) and 1821(d)(5)(B), (C) and (D)). There is *no ability* under the Claims Procedure to request, or obtain, the type of preliminary, equitable or remedial relief which was sought by petitioners under ERISA, 29 U.S.C. §§ 1109, 1132(a)(3) and 1370(a). In addition, there was no ability to cure the irreparable harm in failing to have the Plan properly funded under RTC's Claims Procedure – providing another exception to exhaustion.

Finally, "bias" and "self-interest" on the part of an administrative agency are also grounds to waive "exhaustion." *Gibson v. Berryhill*, 411 U.S. 564, 575-578 (1973) (exhaustion not required when agency had financial, pecuniary interest in outcome and prejudged the facts by litigating the claims).[8]

3. The Claims Procedure Cannot Prevent Effective, Meaningful Judicial Review Of Patently Unlawful Agency Action

Finally, if petitioners were required to file and pursue an agency "proof of claim" concerning the misconduct

---

[8] RTC has *its own* financial, pecuniary interest as a *creditor* in preventing the contributions from being made to the Plan. *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989) (the agency "is often the main creditor against the assets of a failed savings and loan association and thus may well have an incentive" to act in its own interest). *See* 12 U.S.C. §§ 1821(g)(1) and (i)(3), subrogating RTC to rights of depositors and creditors, and § 1821(d)(11) giving RTC a *priority claim*. *See also* proposed 12 C.F.R. § 1613 (55 Fed. Reg. 47481-82, November 14, 1990): "the RTC, as a creditor, shall be assigned the first level of priority of distribution."

and illegality of the RTC's *own conduct*, when RTC has its own financial interest in denying the claim – in a Claims Procedure conducted "behind closed doors," which affords no discovery, no hearing, no cross-examination and no preliminary or equitable remedies – while petitioners suffer irreparable harm before they can present their claims to an impartial Article III Judge, such a procedure would violate Article III and the Fifth Amendment guaranty of Due Process. As held in *Stark v. Wickard*, 321 U.S. 288, 310 (1944):

> The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress. . . . [U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.

Thus, as noted in *Coit v. FSLIC, supra*, 489 U.S. at 578-79, delay in the administrative process which prevents *effective* judicial review of agency action would violate Article III.

In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980), the Supreme Court held that the Fifth Amendment requirement of an impartial and disinterested arbiter,

> helps to guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that

> justice has been done'. . . . Indeed, justice must satisfy the appearance of justice.[9]

Moreover, Due Process requires not only *some* review, but that the "opportunity to be heard 'must be granted at a *meaningful* time in a *meaningful* manner.' " *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (emphasis added), *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 604-605 (1975) It has also "long been recognized that fairness can rarely be obtained by secret one-sided determination of facts. . . . " *Fuentes v. Shevin, supra*, 407 U.S. at 81, *quoting Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring).

In sum, under Article III and the Due Process clause, review of unlawful agency conduct before an impartial Article III Judge means that such review must be *effective* and *meaningful*. Plainly, if petitioners were likely to suffer irreparable harm (in failing to have the Plan fully funded and placed on an actuarially sound basis) while they

---

[9] A "fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *Gibson v. Berryhill, supra*, 411 U.S. at 579 (agency "with substantial pecuniary interests in legal proceedings should not adjudicate these disputes"). Thus, "not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' " *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). *See also Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) ("axiomatic that . . . 'an unbiased judge' is essential to due process"); *Johnson v. U.S. Dept. of Agriculture*, 734 F.2d 774, 783 (11th Cir. 1984) (conflict that may "impinge the hearing officer's impartiality" violates due process); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (due process "prohibits the subtle distortions of prejudice and bias").

were forced to pursue a wholly inadequate "Claims Procedure" before the very agency that committed the unlawful acts and which has its own financial, pecuniary interest in denying the claim, this could hardly be called *effective, meaningful* judicial review consistent with Article III or Due Process. Under such circumstances, the inability to obtain meaningful review before an Article III Judge – due to § 1821(d)(13)(D)(ii), § 1821(j), or any other provision of FIRREA – violates the requirements of Article III and the Fifth Amendment guaranty of Due Process.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Court grant their petition for certiorari.

Respectfully submitted,

ROGER B. KAPLAN, ESQ.
Counsel of Record

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(908) 636-8000
Counsel for Petitioners

DATED: August 15, 1991

APPENDIX A

Kenneth J. ROSA, et al., Plaintiffs,

v.

RESOLUTION TRUST CORPORATION, et al., Defendants.

Civ. No. 90-4559 (CSF).

United States District Court,
D. New Jersey.

Dec. 5, 1990.

Roger B. Kaplan, Laura Studwell, Richard Robins, Wilentz, Goldman & Spitzer, Woodbridge, N.J., for plaintiffs.

Arthur Meisel, Ann. F. Kiernan, on the brief, Jamieson, Moore, Peskin & Spicer, Princeton, N.J., Dennis S. Klein, Robert P. Fletcher, Hopkins & Sutter, Washington, D.C., for defendant Resolution Trust Corp.

Sara L. Reid, Kelley, Drye & Warren, Parsippany, N.J., for Manufacturer's Hanover.

OPINION

CLARKSON S. FISHER, District Judge.

Before the court is a motion for a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. A class of employees seeks to enjoin defendants Resolution Trust Corporation ("RTC"), City Federal Savings Bank, City Savings Bank, F.S.B., and City Savings F.S.B. from resolving an employee pension plan in violation of the terms of the Plan and Agreement of Trust, and the applicable sections of the Employee Retirement

Income Security Act of 1974 ("ERISA"). In addition, the plaintiffs wish to force defendants to continue funding the Plan as required by the Plan documents. For the following reasons, this preliminary injunction is granted.

FINDINGS OF FACT

The facts below are undisputed. On December 31, 1985, City Federal Savings Bank (then known as "City Federal Savings and Loan Association") adopted the Minimum Benefit Retirement Plan ("Plan"). The express purpose of the Plan was to provide:

> retirement benefits and certain other benefits to eligible employees of the Bank and its participating subsidiaries and other participating companies, or to the beneficiaries of such employees, and thereby to encourage employees to make and continue careers with the Bank, all as set forth herein and in the Trust Agreement adopted as part of this Plan.[1]

Ver. Compl. Exh. A at 2.[2]

Section 12 of the Plan sets forth the "Minimum Funding and Contribution" requirements, as follows:

> [T]he Company shall contribute to the Trust, not less frequently than once a year, in accordance with the Code and Regulations, the amounts

---

[1] City Federal had entered into an Agreement of Trust (the "Trust") with defendant Manufacturers Hanover Trust Company whereby Manufacturers Hanover was designated "Master Trustee" for the Plan.

[2] Ver. Compl. refers to the plaintiffs Verified Complaint. In addition, deposition exhibits are cited as "D–#" (defendants) and "P–#" (plaintiffs).

> recommended by the Actuary to the Committee as necessary to maintain the Plan on a sound actuarial basis, consistent with [ERISA], the Code and Regulations after taking into account the retirement benefits to be provided to Participants under the ESOP and retirement benefits previously provided under the Prior Plan. The Committee shall arrange for the establishment and maintenance by the Actuary, or in accordance with his recommendations, of such funding accounts as required by [ERISA].

Id. at 62, § 12.1.

On December 7, 1989, the Director of the Office of Thrift Supervision ("OTS"), Department of the Treasury, ordered that City Federal be closed, and the RTC be appointed Receiver and take possession of City Federal. On that same day, OTS created City Savings Bank, F.S.B. ("City Savings Bank") which assumed certain assets and liabilities of City Federal pursuant to a Purchase and Assumption Agreement dated December 8, 1989. In addition, the employees of City Federal became the employees of City Savings Bank.

On December 9, 1989, Jack P. Shinn, RTC's Managing Agent, met with Jeffrey J. Kaplowitz, City Federal's Executive Vice President in charge of Human Resources, to discuss the various plans in effect and the plans RTC would assume. On December 11, 1989, Shinn distributed a Memorandum which stated: "Employees are the essence of our business. We need you to continue our operations. City Savings [Bank] is maintaining all of City Federal's benefits programs, except for the Employee Stock Ownership Plan." Ver. Compl. Exh. C.

Shortly thereafter, at the behest of Shinn, Kaplowitz distributed a December 21, 1989 Benefits Memorandum to all employees which specifically stated that the Plan at issue would "continue[] unchanged with service from City Federal bridged to City Savings. The eligibility requirements remain the same." Ver. Compl. Exh. D at 2; Kaplowitz Dep. at 21-24.

In a December 26, 1989 memorandum, Thomas W. Meagher (City Savings Bank's in-house attorney responsible for ERISA matters) advised Kaplowitz that in order to effect the assumption of the Plan, City Savings Bank, F.S.B.'s Board of Directors or the RTC (until a board could be elected), had to expressly amend the plan to provide for its assumption and continuation by City Savings Bank, F.S.B. The memorandum further stated that proposed amendments to the Plan for the assumption would be drafted and forwarded to Kaplowitz's attention for appropriate adoption. Exh. D-1.

After reviewing this Memorandum in detail, on January 8, 1990, Shinn forwarded a "Notice of Reportable Event" (Exh. P-9) to the Pension Benefit Guaranty Corporation ("PBGC") which expressly provided that the Plan had been assumed by City Savings Bank, effective December 8, 1989. In addition, Shinn appointed Kaplowitz as Plan Administrator and told him to take the necessary steps of notification to comply with ERISA. Kaplowitz Dep. at 31-32.

Various memoranda and talks were had as to the funding and contribution requirements for the Plan. The demise of the ESOP plan had provided a need for additional funding obligations for the Plan beyond the $1

million contribution previously scheduled for 1989. Shinn was fully apprised of this fact and of the revised quarterly contributions the actuaries had provided by memorandum of January 26, 1990. Kaplowitz Dep. at 29.

A meeting was held on January 30, 1990, specifically to discuss the new, revised "Expense" and "Funding" Requirements of the Plan. The meeting was attended by Shinn (RTC's Managing Agent), Maron (RTC's Assistant Managing Agent), Robertson (RTC's Pension Expert assigned to City Savings Bank by RTC-Atlanta), Kaplowitz (City Savings Bank's Executive Vice President in charge of Human Resources), O'Connor (City Savings Bank's Vice President in charge of Employee Compensation and Benefits, reporting to Kaplowitz), Elinor Hauer (City Savings Banks's Assistant Vice President, reporting to O'Connor), and David Zulauf (City Savings Bank's Assistant Comptroller). The meeting analyzed and discussed the revised "Expense" number of approximately $2,718,957.00 and the revised "Funding" schedule for the Pension Plan totalling $3,212,678.00 as set forth in the Memorandum of January 22, 1990 (Exh. D-2) and in the actuaries' letter report of January 26, 1990 (Exh. P-2).

The next day, Shinn sent Robertson's memorandum and Kaplowitz's reply about the Plan to Sandra A. Waldrop, RTC-Atlanta. Shinn was then transferred back to Atlanta and was succeeded by Brian H. McClelland as RTC's Managing Agent. McClelland was advised as to the results of the Pension Plan meeting of January 30. Although McClelland denies remembering, Kaplowitz testified in detail that he had met with and apprised McClelland of everything, and although McClelland did

not agree with Shinn's actions in every regard, he nonetheless went forward with the assumption of the Plan as evidenced by his request to prepare the necessary IRS documents (Kaplowitz Dep. at 54-58), the execution of a Trust Amendment on February 9, 1990 (Ver. Compl. Exh. F), and the Plan Amendments on February 12, 1990 and March 1, 1990 (Ver. Compl. Exhs. G and H) pursuant to which the Pension Trust and Plan were formally adopted and assumed by RTC for City Savings Bank.

In a March 1990 "Notice To Interested Parties," distributed to all employees of City Savings Bank, the employees were again informed that the Plan was taken over by City Savings Bank, and that City Savings Bank was the Sponsor and Administrator. Ver. Compl. Exh. I.

On March 19, 1990, City Savings Bank sent the revised funding contribution schedule to the PBGC (Exh. P-11) (setting forth the $3.213 million funding schedule). Pursuant to that schedule, in January 1990, City Savings Bank made the Fourth Quarterly Contribution for the 1989 Plan Year; and in April 1990 made the First Quarterly contribution of $271,672 for the 1990 Plan year. However, at the direction of the RTC (Ver. Compl. Exh. J), City Savings Bank has failed to make the Second and Third Quarterly contributions for 1990 (totalling $552,344) and the final payment for 1989 (Kaplowitz Dep. at 111-12). On July 17, 1990, City Savings Bank acknowledged that the failure to submit the Second Quarterly Plan contribution (due on July 15, 1990) was not in compliance with ERISA. Ver. Compl. Exh. K.

On July 19, 1990, the RTC published a "Notice to all Participants and Beneficiaries of the City Federal Savings

Bank Minimum Benefit Retirement Plan." Ver. Compl. Exh. L. Through this Notice, the RTC informed the participants and beneficiaries that it was seeking to terminate the Plan. The RTC further stated that it was "aware that [the employees] were previously informed that the Plan would be assumed by City Savings and that [they] would continue to accrue benefits under the Plan for [their] service with City Savings." *Id.*

Further, the Notice manifested RTC's intent to terminate the Plan retroactively, effective December 7, 1989, despite the express Plan amendments which prohibited such retroactive action. On that same date, July 19, 1990, the RTC issued a "Notice of Intent to Terminate the City Federal Savings Bank Minimum Benefit Retirement Plan." Ver. Compl. Exh. M.

Thereafter, on or about September 11, 1990, the RTC prepared a purported "Second Amendment" to the Plan which contradicted the earlier Plan and Trust Amendments, the earlier memoranda and oral representations, and which contained the following provision: "[City Federal] has determined that the Plan continues to remain a Plan of [City Federal] and is not to be treated as assumed by City Savings Bank, F.S.B." Ver. Compl. Exh. O. This Second Amendment designated the Plan as the "City Federal Savings Bank Minimum Benefit Retirement Plan," and referred to City *Federal's* alleged determination with regard to the Plan – even though City Federal no longer existed, and even though the RTC and City Savings had changed the Plan's name to the "City Savings Bank, F.S.B." Plan.

On September 17, 1990, the Managing Agent of City Savings Bank, an RTC employee, prepared and signed a Form 5500 ("Annual Return/Report of Employee Benefit Plan") which stated that there was a change in the Plan status since benefits ceased to accrue after 12/7/89 due to the 9/20/90 termination of the Plan. Ver. Compl. Exh. P. In that same form the RTC set forth the name of the Plan as the "City Federal Savings Bank Minimum Benefit Retirement Plan," despite the fact that City Savings Bank, under the direction of the RTC, had assumed the Plan, and changed the name of the Plan to the "City Savings Bank, F.S.B. Minimum Benefit Retirement Plan." Ver. Compl. Exh. G. In addition, RTC sent a "Notice of Reportable Event" on September 19, 1990 (dated August 24, 1990) to counsel of the PBGC, which failed to mention that City Savings Bank had assumed the Plan and changed the Plan's name. Ver. Compl. Exh. Q. Finally, on September 21, 1990, the RTC closed City Savings Bank, F.S.B., placed it in Receivership, and transferred certain assets and liabilities to the new entity, City Savings, F.S.B. Plaintiffs assert that these actions were designed, in part, to avoid the legal obligations to City Savings Bank by circumventing the Requirements of FIRREA through an unauthorized and "sham" second receivership, and conservatorship entity.

As a result of the above actions plaintiffs ask this court to enjoin and restrain the RTC, City Federal, City Savings, and their officers and agents from taking any further action to terminate the Plan. They further request an order requiring the defendants to pay and deliver to the Plan (to the Master Trustee): (1) the Second and Third Quarterly Contribution for the 1990 Plan Year in the

amount of $542,344 and, (2) the balance of the Minimum Funding Contribution for the 1989 Plan Year in an amount to be determined by this court at a proof hearing after actuarial depositions (it is estimated at over $2 million). In addition, this injunction would force defendants to make all future contributions to the Plan as required by the Minimum Funding Requirements of the Plan.

I.

This court will first address the various procedural defenses raised by the defendants.

A. *12 U.S.C. § 1821(j).*

The first such defense is that this court is barred from enjoining the RTC pursuant to 12 U.S.C. § 1821(j),[3] which provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation of order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or receiver.

However, plaintiffs claim that § 1821(j) is inapplicable to this case because although RTC has the power to revoke a contract, nothing in FIRREA gives it this power as to a

---

[3] Plaintiffs raised this defense in their motion for dissolution of the preliminary injunction. For simplicity this court will treat both the motion for dissolution and the preliminary injunction application together.

contract it has already assumed. Accordingly, once the RTC had assumed the contract in question, its actions were outside the Section 1821's "functions or powers of the corporation as conservator or receiver."

In addition, even if this court were to find the RTC's actions within its conservatory powers, plaintiffs claim that FIRREA does not prevent them from commencing an action to compel defendants to do that which they are statutorily obligated to do under ERISA and pursuant to the terms of the Plan. In support of this contention, plaintiffs point to *The Rechler Partnership v. The Resolution Trust Corporation*, No. 90 Civ. 3091 (D.N.J. Sept. 4, 1990), which involved a declaratory judgment action by plaintiffs to determine whether the RTC had exceeded a "reasonable time" under FIRREA in assuming a lease. The court held that plaintiffs had not asked the court to restrain the RTC but rather sought the interpretation of a federal statute, and proceeded to extend the time RTC had to repudiate or assume the lease for six days. The court found that although its interpretation would bind the RTC and thus "in a colloquial sense restrain it," this was not an extraordinary result but a necessary one to further the separation of powers. *Id.* at 4.9-4.10. The court concluded:

> FIRREA did not, and Constitutionally could not, divest an aggrieved plaintiff of the right to seek legal redress when the very subject of the grievance is agency action that is allegedly arbitrary and statutorily impermissible.

Id. at 4.9.

Defendants, at oral argument, claimed that 29 U.S.C. § 1144(d) prevented ERISA from being used in this way

to supersede another United States law. That section provides:

> Nothing in this subchapter should be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rules or regulations issued under any such law.

Defendants specifically relied upon *Calhoun v. FDIC*, 653 F.Supp. 1238 (N.D.Tex. 1987), for the proposition that the Federal Banking Agency laws supersede ERISA. In that case, however, the court did not hold that the FDIC is immune from ERISA regulations once it acts as an ERISA fiduciary. Rather, it held that plaintiff could not establish ERISA jurisdiction because: (1) the Plan was terminated before the FDIC became a receiver; and (2) the FDIC did not act as a fiduciary in the first place.

This case differs from *Calhoun* in two ways. First, unlike the *Calhoun* plan, the Plan here was terminated *after* RTC became receiver. Second, this court finds that the RTC acted as a fiduciary, unlike the FDIC in *Calhoun*. ERISA defines a person as a fiduciary to the extent that he exercises any discretionary authority or control respecting management of such plan, or exercises any authority or control respecting management or disposition of its assets. 29 U.S.C. § 1002(21)(A)(i). In *Calhoun*, the FDIC did not act as a fiduciary as it merely held onto the deposits already there. RTC, on the other hand, became a fiduciary when it directed that the bank assume the plan and further directed that it be retroactively terminated. As a fiduciary, it was thus subject to the ERISA regulations.

Further, the *Calhoun* court correctly stated in its analysis that when there is an apparent conflict in the operation of two statutes affecting the same subject matter, the statutes are to be given effect consistent with each other whenever possible. *Accord Columbia Gas Dev. Corp. v. Federal Energy Regulatory Comm'n,* 651 F.2d 1146, 1158 (5th Cir.1981). Although Calhoun correctly considered ERISA's specific provision that it would not supersede other federal laws, that case involved a specific statute authorizing specific powers seemingly in contravention of ERISA. Here, however, nothing in FIRREA expressly allows the RTC to retroactively reject a fully assumed pension plan. Once the RTC has assumed a Plan, it must be subject to the laws that control that contractual obligation, namely ERISA. To find otherwise would make the RTC completely immune from any judicial review and arbiter of its own actions.

In sum, the RTC should not be permitted to be "the judge of the propriety of its own conduct" and Congress "did not create a fourth branch of government beyond the scrutiny of the law" when it vested certain discretionary powers in the RTC to "wind up the affairs of the various institutions under its aegis." *Rechler,* at 4.8. Accordingly, defendants' attempt to frame the issue in this case as one of "restraint" of the powers of the RTC must fail. Such powers are not at issue when plaintiffs seek an adjudication that defendants have failed to comply with their statutory obligations under ERISA, and an injunction compelling them to comply with same.

B. *The Administrative Claims Procedure*

Defendants next argue that this court lacks jurisdiction over this action because plaintiffs are obligated to exhaust their administrative remedies under FIRREA before the commencement of a legal action. *See* 12 U.S.C. §§ 1821(d)(3)–(13) (1990). However, as this court recently held in *Rechler* in a similar context, that argument is without merit:

> [T]he language of the administrative claims procedure explicitly indicates that it was designed to address pre-Receiver claims against the failed depository institution and not post-Receiver [claims] against RTC.

Opinion, at 4.5.

Rechler recognized that the claims procedure was designed to allow the RTC to approve or disapprove asserted claims against the "failed institution" which arose *prior* to RTC's intervention and takeover of the failed institution; therefore, it was inapplicable to the RTC's failure to assume a lease after the RTC had taken over the failed institution. Similarly, this case involves RTC's actions after it took over the bank; therefore, the claims procedure is also inapplicable here. Application of the claims procedure in this case would allow the RTC to adjudicate claims against *itself for its own conduct* occurring after the takeover of City Federal.

In addition, ERISA, 29 U.S.C. § 1370 (Supp.1990), sets forth specific remedies and "Enforcement Authority Relating To Terminations of Single-Employer Plans." Section 1370(a) states that a party to a plan terminated illegally who is adversely affected may bring an action:

"(1) to enjoin such act or practice, or (2) to obtain other appropriate equitable relief (A) to redress such violation or (B) to enforce such provision." Further, § 1370(c) provides that "[t]he district courts of the United States shall have exclusive jurisdiction of civil actions under this section." These sections evidence strong Congressional policy to enjoin, restrain and remedy any acts to terminate a Plan which violate ERISA. Moreover, FIRREA provides no avenue under its administrative procedure for "injunctive" or "other appropriate equitable relief." As such, construing the two statutes together, we must conclude that this action is properly before the court. Consequently, defendants' argument regarding failure to exhaust administrative remedies under FIRREA is rejected.

II.

Now that it has been determined that this court has jurisdiction over this action, I will turn to the substantive issues surrounding the preliminary injunction application.

The Third Circuit has established the following criteria to determine whether a temporary restraining order or preliminary injunction should issue:

1) whether the moving party is reasonably likely to prevail on the merits (reasonable probability of success);

2) whether the movant will be irreparably harmed if injunctive relief is not granted;

3) whether issuance of an injunction will not result in greater harm to the nonmoving party; and

4) whether the public interest would be served by the granting or denial of a preliminary injunction.

Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 197-98 (3d Cir.1990); *Colt Industries, Inc. v. Fidelco Pump & Compressor Corp.*, 844 F.2d 117, 118-19 (3d Cir.1988). In this action, plaintiffs have satisfied all the requirements for the issuance of a preliminary injunction; therefore their application is granted.

A. *Likelihood of Success on the Merits*

This action centers around defendants' alleged violations of ERISA and the contractual terms of the Plan. ERISA provides for civil enforcement, including an injunction, of an employer's obligations to make contributions to pension plans. 29 U.S.C. §§ 1132(a)(3), 1145. The RTC and City Savings Bank were required to make contributions to the Plan pursuant to the terms and conditions of the Plan and the 1990 Amendments to the Plan and the Trust. By directing the Plan Administrator to refrain from making the required contributions, RTC and City Savings Bank have clearly violated their fiduciary duties under ERISA. *See Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1217 (7th Cir.1989) (refusal to pay delinquent contributions was a breach of fiduciary duty under ERISA); *Laborers Fringe Ben. Funds – Detroit & Vicinity v. Northwest Concrete & Constr., Inc.*, 640 F.2d 1350, 1353 (6th Cir.1981).

In addition, the denial of vested benefits constitutes a breach by the RTC and City Savings Bank of fiduciary duties under ERISA. *See Brug v. Pension Plan of Carpenters*

Pension Trust Fund, 669 F.2d 570 (9th Cir.), *cert. denied*, 459 U.S. 861, 103 S.Ct. 135, 74 L.Ed.2d 116 (1982) (plan administrators violated fiduciary duties under § 404 by retroactively applying plan provision excluding beneficiary from coverage where beneficiary had been eligible at time she applied for benefits); *Swackard v. Commission House Drivers Union Local No. 400*, 647 F.2d 712, 713 (6th Cir.), *cert. denied*, 454 U.S. 1033, 102 S.Ct. 572, 70 L.Ed.2d 477 (1981) (retroactive denial of vested right violated ERISA).

Further, PBGC, the governmental entity in charge of regulating pension plans and plan terminations, in Opinion Letter No. 82-25 (1982), confined retroactive terminations of insufficient employer pension plans to situations where: (a) the participants have "no expectation of continued employment after the proposed date [of termination];" (b) the participants "[are] notified on that date of the contemplated termination;" and (c) "no significant loss to the participants results."

Defendants offer no defense that they complied with ERISA or the PBGC. Instead, they advance the argument that 12 C.F.R. § 563.47 (1989) specifically authorizes the RTC as Receiver for City Federal to terminate the Plan, despite its earlier decision to assume it. Section 563.47 provides that no savings association may sponsor an employee pension plan which, "because of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor." On July 5 and 12, 1990, the Managing Agent Committee of City Savings met to determine whether the Plan could cause material loss or damage to City Savings. McClelland Aff., ¶2. The Committee concluded that because the Plan was significantly underfunded the perpetuation of the Plan would cause

material loss or damage to City Savings Bank, and therefore they would terminate it. Consequently, defendants argue that they had just cause to terminate the Plan.

While this argument has appeal, this court does not agree that this CFR section gives the RTC the unfettered discretion to retroactively terminate a pension plan. As plaintiffs assert, while the regulation allows the RTC in the first instance to decline sponsoring a plan it has determined could cause material loss, the regulation does not allow the RTC to elect to sponsor a plan, with knowledge of the costs and potential gains or losses, to then assure the participants and beneficiaries that the plan will continue, and *then* retroactively withdraw its sponsorship upon a purported "reassessment" of the financial data. If accepted, any bank could simply announce that it was concerned about potential financial losses arising from a plan it sponsored, and thereafter abandon the plan without regard to ERISA. This would render meaningless the ERISA requirements imposed on all banks, a result Congress could not have intended given ERISA's goal of protecting pension plans and their participants and beneficiaries.

Similarly, defendants' argument that the government cannot be "estopped" or bound by "unauthorized" conduct must fail. All of the evidence demonstrates overwhelmingly that the RTC was fully apprised during the entire assumption process. Consequently, any contention that an agent, acting for RTC, was not authorized to assume the Plan lacks merit.

For the above reasons, this court finds that the plaintiffs have met the burden of showing a likelihood of success on the merits.

B. *The Irreparable Harm Requirement*

This is probably the most important requirement in determining whether to grant a preliminary injunction. It is not enough to establish a risk of irreparable harm; a plaintiff must prove a clear showing of immediate irreparable injury. *Ecri v. McGraw Hill, Inc.*, 809 F.2d 223, 225 (3d Cir.1987).

In general, courts have found that an injury must be peculiar, such that money damages do not atone for it. *Id.* at 226. However, the fact that the payment of money damages is involved does not preclude a finding of irreparable injury. *United Steelworkers v. Fort Pitt Steel Casting Div. of Conval-Penn, Inc.*, 598 F.2d 1273, 1280 (3d Cir.1979). In fact, the Third Circuit allows a preliminary injunction where warranted to preserve the very availability of a damage remedy. *See Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 205 (3d Cir.1990), (the possibility of an unsatisfied money judgment, as a matter of law, can constitute irreparable injury for preliminary injunction purposes). *Accord Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290, 61 S.Ct. 229, 234, 85 L.Ed. 189 (1940) ("[t]here were allegations that [the defendant] was insolvent and its assets in danger of dissipation or deletion. This being so, the legal remedy against [the defendant], without recourse to the fund in the hands of [a third party], would be inadequate."); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir.1986) (upholding a preliminary injunction issued to protect a potential damages remedy); *Foltz v. U.S. News & World Report*, 760 F.2d 1300, 1307-09 (D.C.Cir.1985) (holding that the irrevocable loss of a cause of action for monetary recovery against an ERISA-

covered pension plan would constitute irreparable injury for preliminary injunction purposes).

In this case defendants contend that plaintiffs cannot prove irreparable harm because an adequate money damage is available to them through normal litigation channels. This court cannot agree. First, as the cases above demonstrate, a preliminary injunction is available to preserve the availability of a money damage remedy. Here, RTC's avoidance of its obligations to the Plan participants and beneficiaries and attempts to immunize itself from judicial review by creating City Savings, F.S.B. threatens the plaintiffs' ultimate ability to collect a damage remedy.

Moreover, the ongoing refusal by RTC and City Savings to make the required contributions to the Plan further warrants injunctive relief because such conduct threatens the Plan's actuarial soundness. *See Gould*, 870 F.2d at 1217 ("ERISA provides for civil enforcement, including an injunction, of an employer's obligations to make contributions to pension plans [and] "failure to make contributions jeopardizes the actuarial soundness of the plaintiff's Funds."); *Robbins v. Lynch*, 836 F.2d 330, 333 (7th Cir.1988). Defendants argue that failure to make contributions to employee trust funds does not constitute *per se* irreparable harm and the court must evaluate the particular facts of each case. In this case, however, there are many factors which point to a finding of irreparable harm.

For example, some employees have been paid lump sums from the plan since December 7, 1989, at a level significantly higher than had the plan in fact ended on December 7, 1989. If the plan is retroactively terminated,

there will have been undue depletion of the plan by virtue of the past recipients getting more than current recipients. Second, Kenneth Rosa, the named plaintiff, has been retired since December 7, but has been unable to get any benefit payments from the pension for which he is entitled. Lastly, the new entity RTC has created is planned to be resolved and there is no guaranty that money will be available in the Plan to pay subsequent retirees. All of these factors support this court's finding that plaintiffs have demonstrated that they will be irreparably harmed without preliminary relief.

C. *Harm to Defendants*

The RTC argues that its Congressional thrift regulation function outweighs the "limited, if any, benefit" plaintiffs will receive if a preliminary injunction should issue. First, plaintiffs will receive more than just a "limited" benefit. They represent innocent participants and beneficiaries who will likely not receive their pensions in full absent a preliminary injunction. Further, the RTC's role in regulating the thrift industry does not give it unbounded license to violate its contractual and federal statutory obligations to the participants and beneficiaries of a pension plan which it knowingly agreed to assume and promised to continue. Accordingly, this court finds that this preliminary injunction will cause no harm to the defendants.

D. *The Public Policy*

This court's final consideration in weighing the appropriateness of a preliminary injunction is the public

interest. ERISA contains express language that evinces a clear national public interest in protecting employees:

> Congress finds . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest.

29 U.S.C. § 1001(a). In fact, the many cases granting preliminary injunctive relief to ERISA plan participants and beneficiaries emphasize the importance of this national public interest. *See Gould*, 870 F.2d at 1221; *Anthony v. Texaco, Inc.*, 803 F.2d 593, 597 (10th Cir.1986); *Van Drivers*, 551 F.Supp. at 432 (citations omitted) ("It is clear that stability and protection require assurance of adequate funding and the prevention of arbitrary termination rights."); *Security Federal Savings Bank v. OTS*, 747 F.Supp. 656 (N.D.Fla.1990). In *Security Federal*, the court issued a preliminary injunction to prevent the OTS from unilaterally abrogating a contract between FSLBB and plaintiffs. The court stated that "the public interest is best served by requiring the government to honor its obligations." 747 F.Supp. at 660.

Bearing in mind the necessity of enforcement of ERISA's strict fiduciary duties, *see Chait v. Bernstein*, 835 F.2d 1017, 1027 (3d Cir.1987), and the absence of any compelling interest in giving the RTC unfettered discretion to abrogate pension plans on a whim, this court finds the national public policy of ERISA weighs heavily in favor of granting this preliminary injunction.

In conclusion, for the foregoing reasons, this court grants plaintiff's request for a preliminary injunction. An order accompanies this opinion.

APPENDIX B

Filed June 27, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-6010

KENNETH J. ROSA; BRIAN O'CONNOR; GERALD L. NEGRI; HERBERT J. KUPFER; PRISCILLA CARPENTER, individually, and on behalf of all participants and beneficiaries of the City Savings Bank, F.S.B., Minimum Benefit Retirement Plan (formerly, the "City Federal Savings Bank Minimum Benefit Retirement Plan")

v.

RESOLUTION TRUST CORPORATION, in its corporate capacity, and as Receiver of City Federal Savings Bank, as Receiver of City Savings Bank, F.S.B. and as Conservator for City Savings, F.S.B.; CITY FEDERAL SAVINGS BANK; MANUFACTURERS HANOVER TRUST COMPANY, a New York Corporation; CITY SAVINGS, F.S.B. ("City Savings"); CITY SAVINGS BANK, F.S.B. ("City Savings")

Pension Benefit Guaranty Corporation, Intervenor

Resolution Trust Corporation, City Federal Savings Bank, City Savings Bank, F.S.B., and City Savings, F.S.B.,

Appellants

Appeal from the United States District Court
for the District of New Jersey

D.C. Civil No. 90-04559

Argued January 11, 1991

Further Briefing Completed April 1, 1991

BEFORE: STAPLETON, GREENBERG and SEITZ,
Circuit Judges.

Filed: June 27, 1991

Roger B. Kaplan (Argued)
Laura V. Studwell
Richard B. Robins
Wilentz, Goldman & Spitzer
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, NJ 07095

Attorneys for Appellees Kenneth J. Rosa, Brian O'Connor, Gerald L. Negri, Herbert J. Kupfer and Priscilla Carpenter, individually and on behalf of all participants etc.

Dennis S. Klein (Argued)
Robert P. Fletcher
Hopkins & Sutter
888 16th Street, N.W.
Washington, D.C. 20006

Arthur Meisel
Ann F. Kiernan
Jamieson, Moore, Peskin & Spicer
300 Alexander Park
CN 5276
Princeton, NJ 08543-5276

Attorneys for Appellants

Sarah L. Reid
Kelley, Drye & Warren
101 Park Avenue
New York, NY 10178

Attorney for Appellee Manufacturers Hanover Trust Company

Carol Connor Flowe
Jeanne K. Beck
Deborah West (Argued)
Deborah J. Bisco
Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, DC 20036

Attorneys for Intervenor Pension Benefit Guaranty Corporation

---

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Defendants Resolution Trust Corporation, City Federal Savings Bank, City Savings Bank, F.S.B., and City Savings, F.S.B. ("appellants") appeal the order of the district court granting plaintiffs, participants in and beneficiaries of a pension plan, a preliminary injunction. This court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) (1988). We review for abuse of discretion. *Tustin v. Heckler,* 749 F.2d 1055, 1060 (3d Cir. 1984). However, our review of legal issues is plenary. *Id.*

Plaintiffs' complaint invoked the jurisdiction of the district court under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et. seq. (1988) ("ERISA"). The Resolution Trust Corporation ("RTC") challenges the district court's jurisdiction over plaintiffs' claims against appellants other than it in its corporate capacity for plaintiffs' failure first to comply

with statutory claims procedures. *See* 12 U.S.C.A. § 1821(d)(3)-(13) (West 1989).

This case involves important issues as to the meaning of certain provisions of the Financial Institutions Reform and Recovery Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 83 Stat. 183 (1989) (codified at various locations in the United States Code) in the context of claims brought under ERISA. Congress recently enacted FIRREA as a response to the crisis in the savings and loan industry that has commanded so much public attention in recent years. For example, the insurance system backing the industry was in financial danger and public confidence in the industry suffered. FIRREA's numerous and complex provisions seek to remedy the problems Congress perceived to result from the existing regulatory scheme. *See* H. Rep. No. 101-54(I), 101st Cong., 1st Sess. 291-312, *reprinted in* 1989 U.S. Code Cong. & Admin. News 86, 87-108 (detailing history and purposes of FIRREA).

One of FIRREA's purposes was "[t]o establish a new corporation, to be known as the Resolution Trust Corporation, to contain, manage, and resolve failed savings associations." 12 U.S.C.A. § 1811 note (West 1989). RTC was created by section 501(b) of FIRREA, 12 U.S.C.A. § 1441a(b) (West Supp. 1991), which also defines its duties, powers, make-up and functions. RTC in large part took over the role of the Federal Savings and Loan Insurance corporation ("FSLIC") with respect to failing insured savings and loan institutions. *See id.* § 1441a(b)(3)(A), (6), (11)(B). Broadly stated, this case involves the functioning of RTC.

I. FACTS

Plaintiffs are participants in and beneficiaries of the City Savings Bank, F.S.B., Minimum Retirement Benefit Plan (originally the City Federal Savings Bank Minimum Benefit Retirement Plan) ("plan"). This plan was created in 1985 and was subject to ERISA. The plan's trustee is Manufacturer's Hanover Trust Company ("trustee").

On December 7, 1989, the Director of the Office of Thrift Supervision ("OTS") issued a series of orders. First the Director appointed RTC receiver for City Federal Savings Bank ("City Federal") for the purpose of liquidation pursuant to its authority under 12 U.S.C.A. § 1464(d)(2)(H)(ii) (West Supp. 1991).[1] The Director next, upon RTC's application under 12 U.S.C.A. § 1821(d)(2)(F)(i) (West 1989), authorized RTC's organization of City Savings Bank, F.S.B. ("City Savings Bank"), and issued a charter under § 1464(a)(2). The Director then appointed RTC conservator for City Savings Bank pursuant to § 1464(d)(2)(B)(i) effective upon RTC's consent of such appointment on behalf of City Savings Bank.

On December 8, under a Purchase and Assumption agreement between RTC as receiver for City Federal and

---

[1] The Director based this action upon a determination under § 1464(d)(2)(A) that (1) there existed substantial dissipation of earnings due to unsafe and unsound practices, (2) City Federal was in unsafe and unsound condition to transact business, (3) losses were likely to deplete City Federal's capital without reasonable prospect of it being replenished absent federal assistance, and (4) the existence of unsafe and unsound business practices was likely to cause insolvency or substantial dissipation of assets or weaken City Federal's condition.

City Savings Bank, RTC as receiver transferred certain City Federal assets and liabilities to City Savings Bank. Many City Federal employees were hired by City Savings Bank.

As a means of encouraging employees to remain with City Savings Bank, RTC as conservator determined that it would assume and continue the plan. This is a critical event because the issues presented arise out of that action and subsequent events. In its capacity as conservator RTC represented to City Savings Bank employees that it assumed the plan, and the record contains numerous references to such communications. On February 9, 1990. RTC as conservator and the trustee executed an amendment of the trust agreement to reflect the assumption. Further, on February 12, RTC as conservator formally assumed the plan effective December 8, 1989, replacing by amendment all references to City Federal with references to City Savings Bank. In all other respects the plan remained in "full force and effect." The Pension Benefit Guaranty Corporation ("PBGC") was notified of the assumption and amendment.[2]

---

[2] PBGC is the federal agency charged with carrying out certain functions under Title IV of ERISA relating to plan termination and termination insurance. *See* 29 U.S.C. §§ 1302, 1303 (1988). PBGC has intervened in this appeal in support of plaintiffs. *See* 29 U.S.C.A. § 1370(d) (West Supp. 1991). We are advised that, subsequent to the district court's order and to the notice of appeal, PBGC intervened in the district court by consent of all parties and filed a complaint on its own behalf. Because PBGC was not a party before the district court when the district court entered the order appealed from, we review PBGC's arguments only as stated in its briefs and argument before this court.

City Savings Bank, through RTC as conservator, made two contribution payments to the trustee as they became due in January and April of 1990. Consistent with the assumption of the plan, participants continued to accrue rights and to have them vest, and the trustee continued to pay benefits.

The record reflects that sometime during the spring or summer of 1990, RTC as conservator began to consider terminating the plan. In July the conservator's managing agent's committee met to discuss its options with respect to the plan. Minutes of the committee's July 5 meeting recite that the committee approved the proposal "to freeze participant benefit accruals." Minutes of the July 12 meeting note that "[t]he Committee unanimously concurred to return the Plan to the Receivership."

On July 13, 1990, Timothy O'Neill, RTC's attorney working on-site at City Savings Bank, instructed Jeffrey Kaplowitz, the plan administrator[3] and an employee of City Savings Bank, not to make the July contribution to the trustee. No further contributions were made by any party.

On July 18, 1990, Mr. O'Neill instructed Mr. Kaplowitz to distribute a notice of plan termination to plan participants. This notice, delivered on July 19, was directed to participants of the City Federal plan and stated that it was from RTC as receiver for City Federal.

---

[3] Under the plan, the plan administrator, an identified bank employee, had "general responsibility for the administration . . . of the Plan (including . . . determining eligibility for benefits [and] authorizing payment of benefits . . .)."

The notice stated that "the Conservator was prevented from assuming the Plan by applicable law, including 12 C.F.R. § 563.47."[4] Further, the notice stated that all benefits ceased accruing as of December 7, 1989 (the date RTC initially took over), and that the expected termination date of the plan was September 20, 1990.

On September 19, 1990, RTC, as receiver for City Federal, sent PBGC formal notice of its intention to terminate. That notice did not mention the assumption, but stated that "[i]n connection with the receivership, the RTC as receiver for City Federal intends to file for a distress termination of the City Federal Savings Bank Minimum Benefit Retirement Plan . . . . " Further, the notice identified City Federal as plan administrator.[5]

On September 21, 1990, the Director of OTS issued another series of orders. The Director first replaced the conservator of City Savings Bank with RTC as receiver for the purpose of liquidation, pursuant to 12 U.S.C.A. § 1464(d)(2)(F) and (H)(ii). Next, based on RTC's application under § 1464(d)(2)(F)(i), the Director authorized RTC's organization of a new bank, City Savings, F.S.B. ("City Savings"), and issued a charter under § 1464(a)(2). The Director then appointed RTC conservator for City

---

[4] 12 C.F.R. § 563.47(a) (1990) states in part: "No savings association . . . shall sponsor an employee pension plan which, because of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor."

[5] We infer from this representation that some time between the July 19 notice to participants and the September 19 notice to PBGC, RTC as receiver for City Federal assumed the functions of Mr. Kaplowitz as plan administrator.

Savings, effective upon RTC's consent, under § 1464(d)(2)(B)(i). On the same day, pursuant to a Purchase and Assumption Agreement between RTC as receiver for City Savings Bank and City Savings, City Savings Bank transferred certain assets and liabilities to City Savings.

On November 6, 1990, plaintiffs brought this class action in the United States District Court for the District of New Jersey.[6] Named as defendants were RTC in its various capacities (corporate capacity, receiver for both City Federal and City Savings Bank, and conservator for City Savings), City Federal, City Savings Bank, City Savings and the trustee.

The complaint contained seven "counts." Relevant to this appeal are the following: (1) City Savings Bank failed to make contributions to the plan and threatened wrongfully to terminate it on a retroactive basis without 100% vesting in violation of the plan and ERISA, 29 U.S.C. §§ 1053 and 1082; (2) RTC and City Savings Bank violated their fiduciary obligations under ERISA, 29 U.S.C. § 1104; (3) RTC and City Savings Bank breached the trust agreement and plan; (4) RTC and City Savings Bank induced plaintiffs justifiably and detrimentally to rely on assurances with respect to the plan; and (5) City Savings was created as a "sham" to avoid certain obligations under the plan and FIRREA.[7]

---

[6] It has come to our attention that, subsequent to the notice of appeal, the district court entered an order certifying the class.

[7] Plaintiffs also claimed fiduciary breaches by the trustee for, *inter alia*, "wrongfully permitting the Plan Administrator to

(Continued on following page)

Plaintiffs sought judgment (1) adjudging and declaring that RTC, City Savings Bank and City Savings acted wrongfully, (2) preliminarily and permanently enjoining those defendants from retroactively terminating the plan, (3) ordering those defendants to make all contributions due and owing, as well as future contributions when they became due, to the trustee. Plaintiffs also requested compensatory and punitive damages, costs and fees, and "other and further relief as the Court deems just and proper."[8]

On December 5, 1990, the district court issued its opinion and order granting a preliminary injunction against appellants. *Rosa v. Resolution Trust Corp.*, 752 F. Supp. 1231 (D.N.J. 1990). The court's December 5 order was amended on December 10, *nunc pro tunc* to December 5. The December 10 order (1) enjoined appellants from "taking any further action to terminate the [plan], or from taking any other action which would prejudice or adversely affect the rights of participants and beneficiaries of the Plan," (2) enjoined appellants from "sending or filing any further documents with [any governmental agency]

(Continued from previous page)

refrain from making the required Plan contributions." We note that the trust agreement contained a provision stating that the trustee "shall not have authority to enforce the collection from the Company or from any Employer of any contribution to the Master Trust Fund." The trustee is not a party to the preliminary injunction, and thus no issue is before this court as to its potential liability.

[8] We note that we are not called upon to consider the applicability of the exhaustion requirements of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1988), to this case.

for the purpose of terminating the Plan," (3) ordered appellants to pay contributions due and owing, totaling over two and one-half million dollars, to the trustee and (4) ordered appellants to continue to make all future contributions on a timely basis as required by the plan. Appellants filed a timely notice of appeal.[9]

II. DISCUSSION

A few preliminary matters must be noted. First, the district court's order runs against and is appealed by RTC, City Federal, City Savings Bank and City Savings. Although only RTC filed a brief which it labeled "Brief of Appellant Resolution Trust Corporation," the parties before us have assumed that RTC speaks for all appellants. We shall do likewise. Therefore, any reference in this opinion to a contention made by RTC shall be deemed to be on behalf of the parties entitled to make such arguments.

Second, the parties agree that the takeover by a government agency did not alter the private character of the plan and we shall proceed on that basis.

Finally, we note that plaintiffs labor, as did the district court, under the misconception that the plan was, or was attempted to be, retroactively terminated. This is inconsistent with the record before us because the notice

---

[9] By order of this court, upon the consent of the parties, the payment provisions of the December 10 order are stayed pending the disposition of this appeal, on the condition that appellants pay into an escrow account certain of the amounts required to be paid to the trustee under the order.

of termination contained a future date for termination of the plan and a retroactive date for the termination of benefits. Thus subtle distinction is important because benefits and plan termination are separate legal concepts under ERISA and involve separate rights. *See, e.g.*, 29 U.S.C. §§ 1002 (defining plans subject to ERISA as those providing certain benefits); 1025 (reporting participant benefit rights); 1054-1056 (vesting, accrual and payment provisions for pension benefits); 1132(a)(1)(B) (action to recover benefits); 1341-1368 (procedure and liability respecting plan termination). We do not intend, however, to imply that termination and benefits are wholly separate and distinct, *see, e.g., id.* § 1322 (benefits guaranteed by PBGC at termination), but to emphasize the distinction for the purposes of clarity.

A. SUBJECT MATTER JURISDICTION OF THE DISTRICT COURT

We are met at the outset by the contention of RTC that the district court lacked subject matter jurisdiction to entertain plaintiffs' claims, except those against RTC in its corporate capacity. RTC argues that plaintiffs failed to exhaust FIRREA's claims procedures under 12 U.S.C.A. § 1821(d)(3)-(13) (West 1989).[10] RTC relies specifically on § 1821(d)(13)(D), which provides as follows:

---

[10] Sections 11, 12 and 13 of the Federal Deposit Insurance Act, as amended, 12 U.S.C.A. §§ 1821, 1822 & 1823 (West 1989), which are applicable to the Federal Deposit Insurance Corporation, are made applicable to RTC by way of another provision of FIRREA, 12 U.S.C.A. § 1441a(b)(4) (West Supp. 1991).

> Except as otherwise provided in this subsection, no court shall have jurisdiction over –
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

Both plaintiffs and PBGC contend, although for different reasons, that the above provision does not apply to plaintiffs' claims. Plaintiffs argue, based on the district court's ruling, that the jurisdictional bar applies only to "pre-takeover" claims, i.e., claims against a depository institution arising prior to RTC'S intervention. PBGC argues more broadly that the bar does not apply to the statutory claims plaintiffs assert.

Preliminarily, we are satisfied that § 1821(d)(13)(D), to the extent that it conflicts with a provision of ERISA granting the district court jurisdiction, prevails with respect to the subject matter jurisdiction of the district court.

That the bar is a statutory exhaustion requirement is indicated by the language "except as otherwise provided in this subsection." Subsection (d) of § 1821 provides for *de novo* district court jurisdiction only after the filing of a claim with, and the initial processing of that claim by, RTC pursuant to § 1821(d)(5) and (6)(A).[11] Plaintiffs do

---

[11] That such court action is *de novo* is indicated in FIREA's prohibition against judicial review of the initial claims

(Continued on following page)

not contend that they have filed with a receiver any of the claims asserted in this action. Thus, unless the bar is inapplicable, the district court lacked jurisdiction over plaintiffs' claims.

We note that clause (i) of the bar refers to "any depository institution for which the Corporation has been appointed receiver." We believe that clause (ii) in using the phrase "such institution" clearly refers back to clause (i), and specifically to the depository institutions to which clause (i) applies. It is clear that all three banks involved in this case are "depository institutions" within the meaning of this language. Under the Federal Deposit Insurance ("FDI") Act, as amended by FIRREA, "depository institution" is defined as "any bank or savings association." 12 U.S.C.A. § 1813(c)(1) (West 1989). A "savings association" is defined as, *inter alia*, "any federal savings association," *id.* § 1813(b)(1)(A), which in turn is defined as "any Federal savings association or Federal savings bank which is chartered under section 1464 of this title." *Id.* § 1813(b)(2).

The record reveals that both City Savings Bank and City Savings were chartered by the Director of OTS pursuant to its authority under section 5(a)(2) of the FDI Act, as amended by FIRREA, 12 U.S.C.A. § 1464(a)(2) (West Supp. 1991). The record further reveals that City Federal was chartered prior to FIRREA by the Chairman of the Federal Home Loan Bank Board under the authority of

---

(Continued from previous page)

determination. *See id.* § 1821(d)(5)(E); H.R. Rep. No. 101-54(I), 101st Cong., 1st Sess. 418, *reprinted in* 1989 U.S.Code Cong. & Admin. News 86, 214.

section 5 of the FDI Act, which was section 1464 prior to its amendment by FIRREA. Therefore, these institutions are Federal savings associations within the meaning of the FDI Act, and thus are "depository institutions" under § 1821(d)(13)(D).

We turn then to plaintiffs' and PBGC's contentions that the bar does not encompass plaintiffs' claims. Plaintiffs contend that the bar refers only to claims against a "failed institution." We understand plaintiffs to be arguing that the language "any depository institution for which the Corporation has been appointed receiver" does not apply to claims against a depository institution which arise once a conservator or receiver has been appointed for that institution. If we were to agree with this position, all of plaintiffs' claims would fall outside the bar because all the claims arise out of appellants' alleged acts and omissions subsequent to RTC's initial intervention.

Plaintiffs' argument requires that we state our understanding of the meaning of the statutory language "for which the Corporation has been appointed receiver." First of all, the "Corporation" referred to is RTC. Second, we again note that clause (ii), in referring to "such institution," imports the language of clause (i), and thus also refers to a depository institution "for which the Corporation has been appointed receiver."

The language of the bar simply states that it applies when there is an institution for which RTC "has been" appointed receiver. Thus the issue under the bar is whether, at the time the case came before the district

court, RTC had been appointed receiver of the institutions.[12]

RTC was appointed receiver of City Federal on December 7, 1989, and of City Savings Bank on September 21, 1990. Both of these events occurred prior to plaintiffs' filing suit on November 6, 1990. Thus, as we read the language of the bar, both are depository institutions for which RTC has been appointed receiver. Therefore, we must reject plaintiffs' contention that the language refers only to pre-takeover institutions.

We note an exception to our analysis as to City Savings. At the time the complaint was filed, City Savings was in conservatorship, not receivership.[13] Thus, City Savings was not then a depository institution "for which the Corporation has been appointed receiver."

PBGC contends more broadly that the bar has no application to plaintiffs' claims. PBGC characterizes plaintiffs' claims as requiring a resolution of the question whether appellants violated ERISA, and argues that the "claims" referred to in the bar do not encompass such claims. PBGC thus seeks to make a distinction between plaintiffs' ERISA claims and "claims for payment."

---

[12] It is a firmly established rule that subject matter jurisdiction is tested as of the time of the filing of the complaint. *See F. Alderete Gen. Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983) (citing *Rosado v. Wyman*, 397 U.S. 397, 402 (1970); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 1938)).

[13] It was brought to our attention during this appeal process that RTC has now been appointed receiver for City Savings.

We see no basis for such a distinction in the language of the bar. Nor are we willing to strain the language to exclude these claims from the claims procedure, particularly in light of the fact that the claims are subject to *de novo* judicial action following the initial determination of RTC. We thus reject PBGC's challenge to the applicability of the bar to plaintiffs' ERISA claims.

Having disposed of plaintiffs' and PBGC's broad objections, we turn to RTC's contention that the bar applies to certain of plaintiffs' claims. RTC concedes that plaintiffs' claims asserted against it in its corporate capacity are not subject to the jurisdictional bar.[14] We agree with RTC that the language of the bar cannot be construed to reach claims asserted against RTC in its corporate capacity. However, RTC does argue that the claims asserted by plaintiffs against the other appellants, and for which the district court granted relief, are subject to the bar. We turn first to those claims for which the district court granted monetary relief.

1. Claims for Monetary Relief

The district court's order granted monetary relief based on plaintiffs' claims related to the failure to make

---

[14] RTC, although it concedes that the jurisdictional bar does not apply to it in its corporate capacity, argues that the claims against it must be dismissed, upon dismissal of the other claims for lack of subject matter jurisdiction, due to the absence of indispensable parties. This argument is premature at best because our subject matter jurisdiction rulings on this appeal from the granting of a preliminary injunction do not automatically result in the dismissal of any party from the case.

payments to the plan. RTC argues that since those claims seek monetary relief, although dressed in injunctive garb, they are barred under clause (i) of § 1821(d)(13)(D) because payment would necessarily come from the assets in the possession of RTC as receiver for one or more of the banks. RTC asserts, in addition, that clause (ii) is also a bar because plaintiffs' claims relate to the acts or omissions of a depository institution for which RTC was appointed receiver.

Putting aside the claims to the extent they seek to hold RTC liable in its corporate capacity we address RTC's contention that plaintiffs' claims for monetary relief fall within clause (i) because they seek payment from the assets of one or more of the receivership estates. As noted above, the statutory language of that clause, "depository institution for which the Corporation has been appointed receiver," in this case covers City Federal and City Savings Bank but does not apply to City Savings. Thus the bar embodied in clause (i) reaches (1) claims for payment from the assets of City Federal or City Savings Bank, (2) actions for payment from those assets and (3) actions for a determination of rights with respect to those assets.

We conclude that plaintiffs' monetary claims against City Federal and its receiver and against City Savings and its conservator and receiver fall within the language of clause (i) referring to actions for payment from the assets of a depository institution for which RTC has been appointed receiver. This is so because any recovery against those entities will be satisfied, if at all, from the assets of City Federal or City Savings Bank, entities for which we have determined RTC has been appointed

receiver. Given this conclusion, was need not address RTC's argument that those claims are also barred under clause (ii).

This brings us to the monetary claims against City Savings and its conservator. We do not believe these claims fall under clause (i) because they seek neither payment from nor a determination of rights with respect to the assets of a depository institution for which RTC has been appointed receiver. Rather, those claims seek payment from the assets of City Savings, which, for our purposes, is not a depository institution for which RTC has been appointed receiver. Nor does clause (ii) bar these claims. This is so because we construe the "relating" language of that clause to refer to claims against the very institution whose acts are challenged, which must be an institution for which RTC has been appointed receiver. Similarly, the claims against City Savings and its conservator do not relate to acts or omissions of RTC "as receiver."

In summary, plaintiffs' monetary claims against appellants other than City Savings and its conservator and RTC in its corporate capacity are subject to the jurisdictional bar. Thus, the jurisdictional basis for the issuance of the injunction directing those appellants to make payments to the plan is lacking.[15]

---

[15] Plaintiffs argue that clause (ii) of the bar applies only to challenges to RTC's administration of the claims procedure in its capacity as receiver. Because we have based our ruling barring certain of plaintiffs' monetary claims only on clause (i) of the bar, we need not address this argument.

2. Claims for Nonmonetary Relief

The district court also granted relief on the claims for which plaintiffs sought an order enjoining the retroactive termination of the plan. We turn now to the formidable issue as to whether those claims seeking nonmonetary relief are also barred by any part of § 1821(d)(13)(D). The pertinent provisions are contained in clauses (i) and (ii) and bear repeating:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over –
>
> (i) any claim or action for payment from, or any action, seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

As noted above, clause (i) is confined to claims or actions seeking payment from the assets of City Federal or City Savings Bank in receivership, or actions seeking a determination of rights with respect to those assets; whereas clause (ii) refers to claims relating to any act or omission of "such institution or the Corporation as receiver." As previously noted, we interpret "such institution" to refer to clause (i) and thus in this case to City Federal and City Savings Bank.

We do not think Congress intended that plaintiffs' claims for an order prohibiting retroactive termination of the plan would be barred by clause (i). We believe the

emphasis on "assets" suggests that clause (i) addresses claims looking directly to payments from or recovery of assets, or in some other respect determining rights with respect to assets. Based on this view, clause (i) does not encompass purely injunctive claims relating to retroactive termination of a plan, and was not a bar to the district court's jurisdiction over plaintiffs' nonmonetary claims.

We next consider whether clause (ii) bars a claim seeking to restrain the retroactive termination of the plan. Whatever its breadth, we do not believe that clause (ii) encompasses claims that are not susceptible of resolution through the claims procedure. The claims procedure provides RTC with the authority to "determine claims," 12 U.S.C.A. § 1821(d)(3), to "allow" and "disallow" claims, *id* § 1821(d)(5)(B), (C)(i), (D), and to "pay creditor claims," *id*. § 1821(d)(10)(A). We are at a loss to understand how RTC would "determine," or "allow" or "disallow," a claim seeking an order barring retroactive termination of the plan, or how it would "pay" such a claim if allowed. Thus we conclude that plaintiffs' claims for an injunction prohibiting retroactive termination of the plan are not susceptible of resolution in the claims procedure.

We therefore conclude that plaintiffs' claims for nonmonetary injunctive relief – barring retroactive termination of the plan – are not subject to the jurisdictional bar.

3. Exceptions to Exhaustion

Given that some of plaintiffs' claims are subject to the jurisdictional bar, we must address plaintiffs' and PBGC's

arguments that exhaustion should be excused and plaintiffs' arguments that the claims procedure is unconstitutional. Because we have determined that plaintiffs' claims for nonmonetary relief do not fall within the bar, we need only address these arguments as they relate to claims for monetary relief.

Plaintiffs and PBGC assert that exhaustion of the claims procedure should be excused in this case on a variety of grounds. RTC maintains that judicial exceptions to exhaustion do not apply where exhaustion is a statutory jurisdictional requirement, and that, in any event, plaintiffs and PBGC have not established the applicability of any exception.

Initially we note that we are not confronted with a judicially created exhaustion requirement, but with one that is mandated by statute. Further, Congress made this statutory exhaustion requirement explicitly jurisdictional. We are thus mindful of our responsibility to apply this requirement "with a regard for the particular administrative scheme at issue." *See Weinberger v. Salft*, 422 U.S. 749, 765 (1975).

In this case we need not decide whether an exception can ever apply to the statutory exhaustion requirement embodied in § 1821(d)(13)(D), because the theories advanced by plaintiffs and PBGC do not warrant recognition of an exception here.

Plaintiffs contend that requiring exhaustion would be futile in this case because RTC has already stated its position on the merits of their claims. PBGC makes the related argument that RTC has already made a final determination on the controlling legal question.

We do not believe that requiring exhaustion of the monetary claims in this case would be futile. RTC's legal position in this litigation is not necessarily conclusive of the receiver's determination of plaintiffs' claims. If RTC as receiver were to allow and satisfy plaintiffs' claims in whole or in part, the dispute now before this court would be moot to that extent.

Plaintiffs also insist that the receiver is not able to grant the relief they request. First, they state that, even if the receiver were to allow their claims, at most they will be granted "a 'Receiver's Certificate' against an assetless entity, and without recoupment of their substantial attorneys' fees and costs." Second, they argue that they will be unable to obtain "the type of preliminary, equitable or remedial relief" they seek. Third, they argue that "there was no ability to cure the irreparable harm in failing to have the Plan properly funded. . . . "

The thrust of plaintiffs' argument is that the receiver is unable to provide them with monetary relief. We are unable at this stage to say that the receiver could not compensate plaintiffs through the claims procedure. The assets available for these and other creditors, as well as plaintiffs' priority status, are neither part of the record before us nor determinable by this court at this juncture but are properly determinable by the receiver. Nor does the possible six-month period for exhaustion of the claims procedure[16] in and of itself render the claims procedure inadequate, in contrast to the limitless delay

---

[16] Under the claims procedure the maximum time a claimant must wait after filing its claim before bringing suit is 180 days. *See* 12 U.S.C.A. § 182(d)(6)(A) (West 1989).

that could be imposed by FSLIC in *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989).

To the extent plaintiffs argue that the receiver is unauthorized or unable to provide the nonmonetary relief they request, we agree, and for that reason have already determined that such claims are not subject to the bar.

We turn now to plaintiffs' argument that because they cannot obtain allowance of attorneys' fees and costs in the claims procedure, the remedy afforded by that procedure is inadequate and, therefore, they should not be required to exhaust. We assume that in speaking of attorneys' fees and costs plaintiffs refer to expenses incurred in this litigation. Plaintiffs' argument presupposes that the district court could grant such fees and costs. We think this presupposition is invalid because, as to claims over which the district court lacked jurisdiction, even the district court could not grant such fees. Thus, the receiver's alleged inability to award attorneys' fees incurred in this litigation does not speak to the adequacy of the claims procedure.

PBGC argues that the purposes underlying exhaustion are not served by requiring plaintiffs to comply with the claims procedure, and thus exhaustion should be excused. In particular, PBGC contends that the purposes of exhaustion are not served when only legal issues are involved, i.e., whether appellants violated ERISA, and where RTC has no expertise as to those legal issues. *See, e.g., Flying Tiger Line v. Teamsters Pension Trust Funds*, 830 F.2d 1241, 1252-53 (3d Cir. 1987); *Bethlehem Steel Corp. v.*

Environmental Protection Agency, 669 F.2d 903, 907 (3d Cir. 1982). We again stress that we must examine this question in light of the particular scheme envisioned under FIRREA. *See Salft*, 422 U.S. at 765. The primary purpose underlying FIRREA's exhaustion scheme is to allow RTC to perform its statutory function of promptly determining claims so as to quickly and efficiently resolve claims against a failed institution without resorting to litigation. *See* H.R. Rep. No. 101-54(I), 101st Cong., 1st Sess. 418-19, *reprinted in* 1989 U.S. Code Cong. & Admin. News 86, 214-15. Thus, the purpose underlying exhaustion in this context is more limited than under other schemes. This is reasonable given the brevity of the exhaustion procedure and the *de novo* judicial review of claims once the procedure is exhausted. Because exhaustion in this case will fulfill this narrow purpose, no exception is warranted.

4. Constitutional Challenges

We turn now to plaintiffs' constitutional arguments. Plaintiffs contend that requiring them to submit their claims to RTC as receiver is unconstitutional under Article III and the fifth amendment requirement of due process. Specifically, plaintiffs argue that they will be denied meaningful and effective review because they must submit their claims to initial review by a biased entity without the benefit of discovery or a hearing and will suffer irreparable harm before they can present their claims to an Article III court.

RTC argues that the claims procedure does not violate Article III because it gives a claimant the opportunity to sue in a *de novo* court action a maximum of six months

after it files its claim. We agree. Plaintiffs are not deprived in any way of access to an Article III court, but at most suffer a relatively slight delay to permit a receiver to determine whether to allow their claims. *Cf. Coit*, 489 U.S. at 578 (Court did not reach Article III argument in light of ruling that FSLIC did not have adjudicatory authority over plaintiffs' claims and that plaintiffs were entitled to *de novo* judicial consideration of claims).

As to due process, plaintiffs first argue that the claims procedure fails to provide them an opportunity to be heard at a meaningful time and in a meaningful manner. They cite *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), which addressed the constitutional adequacy of post-seizure hearings. We distinguish this case from those cited by plaintiffs on the ground that we do not address the problem of a seizure of property without a prior hearing, and find no other support for plaintiffs' position that the opportunity for a *de novo* court action six months after they file their claims fails to provide them meaningful review.

Finally, plaintiffs argue that RTC is biased because it is called upon to review its own challenged conduct and possesses a financial interest in the determination of plaintiffs' claims.[17] *See, e.g., Marshall v. Jerrico, Inc.*, 446

---

[17] Plaintiffs argue that under FIRREA RTC has a financial interest in preventing contributions to the plan by virtue of its being a creditor of the institution. *See Coit*, 489 U.S. at 587 (FSLIC often main creditor of failed association); 12 U.S.C.A. § 1821(g) (Corporation subrogated to rights of depositors),

(Continued on following page)

U.S. 238 (1980); *Gibson v. Berryhill*, 411 U.S. 564 (1973). Given the nature of the bias alleged, we conclude that there is no due process violation because the receiver's determination is not a binding adjudication and because, if plaintiffs so choose, a court will evaluate their claims *de novo*.

Based on the foregoing, we conclude that the bar applies to plaintiff's monetary claims against all appellants other than City Savings and its conservator and RTC in its corporate capacity. This requires reversal of all aspects of the district court's order based on such claims. After excising these portions, what remains of the preliminary injunction for further analysis is as follows: (1) City Savings and its conservator and RTC in its corporate capacity were ordered to make all contributions due under the plan to the trustee and to make all future contributions as due; and (2) all appellants were enjoined from taking any further action to terminate the plan and from taking any other actions which would prejudice or adversely affect the rights of the plaintiffs; and (3) all appellants were enjoined from sending or filing any further documents for the purpose of terminating the plan.

B. PRELIMINARY INJUNCTION AGAINST APPELLANTS OTHER THAN RTC IN ITS CORPORATE CAPACITY

RTC contends that a provision of FIRREA, 12 U.S.C.A. § 1821(j) (West 1989), prohibited the district

---

(Continued from previous page)

(d)(11) (West 1989) (receiver gives Corporation priority in liquidation on subrogated claims).

court's injunction in all its respects except as to RTC in its corporate capacity. Section 1821(j) reads:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

RTC concedes that this provision does not affect orders running against it in its corporate capacity. Here again we note that, to the extent of a conflict between this provision and provisions of ERISA authorizing relief, § 1821(j) controls.

Before confronting RTC's contention, we initially address plaintiffs' and PBGC's broad challenge to the applicability of § 1821(j) to the district court's order. We understand their argument to be that, while RTC as conservator and receiver is authorized to run the affairs of a troubled institution, including its personnel relation affairs, it is only authorized to run them in a legal manner. Thus, because the termination of the plan was illegal under ERISA, that termination was not among the "powers or functions of the Corporation as a conservator or receiver."

We find no such limitation in the language of § 1821(j). Furthermore, plaintiffs' and PBGC's interpretation would undermine the purpose of the statute, namely, to permit RTC as conservator or receiver to function without judicial interference that would restrain or affect the exercise of its powers. *See infra* at 34. We therefore reject plaintiffs' and PBGC's broad challenge and move

on to address RTC's contention as to the applicability of § 1821(j) to the district court's order.

RTC's argument first requires that we identify the powers of RTC as conservator and receiver. These powers are defined by FIRREA and for the most part are found at 12 U.S.C.A. § 1821(d)(2) (West 1989) which provides in part as follows:

> (A) Successor to institution
>
> The Corporation shall, as conservator or receiver, and by operation of law, succeed to –
>
> > (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; . . .
> >
> > . . . .
>
> (B) Operate the institution
>
> The Corporation may, as conservator or receiver –
>
> > (i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;
> >
> > . . . .
> >
> > (iv) preserve and conserve the assets and property of such institution.
>
> . . . .
>
> (D) Powers as conservator

> The Corporation may, as conservator, take such action as may be –
>
> > (i) necessary to put the insured depository institution in a sound and solvent condition; and
> >
> > (ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.
>
> (E) Additional powers as receiver
>
> The Corporation may, as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

The quoted statutory powers given the conservator and receiver are quite broad, in keeping with the emergent objectives of the statute. We must determine whether the terms of the preliminary injunction requiring City Savings and its conservator to make payments to the plan "restrain or affect the excercise" of those powers.

The injunction orders City Savings and its conservator to make the contributions due and owing to the trustee and to continue to make timely contributions to the trustee as required by the plan. We think these provisions impinge on the statutory powers of RTC as conservator of City Savings (and now as receiver) to "preserve and conserve the assets and property of such institution." *Id.* § 1821(d)(2)(B)(iv). We say this because implementation of the injunctive provisions would clearly require distribution of the assets of City Savings and thereby encroach on the power of the conservator (now receiver) to preserve and dispose of the assets within its control.

Indeed, implementation of these provisions of the injunction could result in forcing City Savings to accord the trustee, and therefore the beneficiaries of the plan, a preference over other creditors.

Thus, to the extent the district court's injunctive order required City Savings, and its conservator or receiver, to pay money from its assets, it violated § 1821(j) and must be reversed.

We now turn to the injunction as it provides nonmonetary relief against all appellants other than RTC in its corporate capacity. This portion of the order essentially bars appellants from taking any action to terminate the plan.[18]

The plan established by City Federal provided at section 15.1(a) that City Federal's Board of Directors "reserves the right at any time to amend, suspend or terminate the Plan . . . for any reason and without the consent of any . . . Participant [or] Beneficiary. . . . " Under § 1821(d)(2)(A)(i) the receiver for City Federal succeeded to the termination rights contained in the original plan. Further, the assumption did not alter this provision of the plan, and thus under the plan RTC, as

---

[18] The nonmonetary provisions of the order clearly prohibit either steps to terminate or the filing of documents for the purpose of terminating. The order also prohibits "any other action which would prejudice or adversely affect the rights of" plaintiffs. The language and placement of the latter provision indicate that it is related to and flows from the provision barring termination, and for that reason we read it together with that provision to bar termination.

conservator or receiver for City Savings Bank, reserved the same right to terminate.[19] Under these circumstances the nonmonetary provisions of the order prohibiting City Federal and City Savings Bank from taking steps to terminate the plan encroached on the exercise of statutory power residing in RTC as receiver and conservator.

This analysis is not inconsistent with the Supreme Court's recent decision in *Coit*, 489 U.S. 561. In that case, which was decided prior to the enactment of FIRREA, a savings institution was sued for damages and declaratory relief for breach of contract and other state law claims. After FSLIC was appointed receiver of the institution and removed the case to federal court, FSLIC sought to have the action dismissed. FSLIC argued that 12 U.S.C. § 1464(d)(6)(C), a statute similar to § 1821(j),[20] barred the relief on the ground that resolution of the suit would restrain and affect the exercise of its powers as receiver. The Court disagreed and permitted the suit to continue.

---

[19] No party challenges the right under ERISA of an employer to take steps toward terminating a plan. *See, e.g.*, 29 U.S.C. § 1341. We note that under ERISA it is the plan administrator who carries the obligations with respect to termination. *See, e.g., id.*

[20] The legislative history to FIRREA shows that Congress intended § 1821(j) to have the same effect as 12 U.S.C. § 1464(d)(6)(C) (1988). *See* H. Rep. No. 101-54(I), 101st Cong., 1st Sess. 334, *reprinted in* 1989 U.S. Code Cong. & Admin. News 86, 130. That section, now amended by FIRREA, *see* 12 U.S.C.A. § 1464(d)(2)(G) (West Supp. 1991), stated "Except as otherwise provided . . . no court may . . . restrain or affect the exercise of powers or functions of a conservator or receiver."

The Court stated that the statutory language "prohibits courts from restraining or affecting FSLIC's exercise of those receivership 'powers or functions' that have been granted by other statutory sources." 489 U.S. at 574. Because the Court had ruled that FSLIC was not granted the statutory authority to adjudicate claims, judicial resolution of those claims did not impinge on its powers. In contrast to the situation in *Coit*, we have determined that the order does impinge on the exercise of powers granted by statute.

This brings us to that aspect of the district court's order prohibiting City Savings from terminating the plan. In contrast to the City Savings Bank, City Savings did not assume the plan, and in fact the plan was "returned" to City Federal prior to City Savings' coming into existence. Thus, as to it this portion of the injunction has no meaning or effect because City Savings had no authority with respect to the plan.

In light of the foregoing we conclude that in granting monetary relief against City Savings, and in prohibiting City Federal and City Savings Bank from terminating the plan, the injunction contravenes the provisions of § 1821(j).[21] Further, in prohibiting City Savings from terminating the plan the injunction has no force or effect. On these bases the district court's order granting monetary relief against City Savings and nonmonetary relief

---

[21] We emphasize that our ruling involves the application of § 1821(j) to a portion of this injunction, and we express no opinion as to the general scope of the language of that provision.

against all appellants other than RTC in its corporate capacity must be reversed.

In reaching our conclusion that some portions of the district court's order were prohibited by § 1821(j), we emphasize that the effect of that section in this case is solely to prevent a particular remedy in the interest of allowing RTC as receiver or conservator promptly to perform its important functions in dealing with the savings and loan crisis. It does not deprive plaintiffs, if wronged, of any other remedy that would not "restrain or affect" the exercise of the receiver's or conservator's powers or functions. We naturally express no opinion as to the alleged wrongfulness of RTC's conduct.

Moreover, we do not mean to the understood as saying that an order restraining or affecting RTC's exercise of its powers as receiver or conservator could never issue. Indeed, courts have recognized exceptions to provisions worded even more broadly than § 1821(j). *See, e.g., South Carolina v. Regan*, 465 U.S. 367, 378 (1984) (provision prohibiting courts from enjoining collection of taxes does not prohibit injunction where Congress has provided plaintiff with no alternative remedy); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (prohibition of tax injunction statute might not apply where it is apparent that at the time of suit, under most liberal view of facts and law, government cannot establish claim). However, we are not asked to invoke any such exception to the statutory language.

C. PRELIMINARY INJUNCTION AGAINST RTC IN ITS CORPORATE CAPACITY

The final task left to us is to address RTC's argument that the district court's order against it in its corporate capacity must be reversed. As we stated above, RTC concedes the inapplicability to it of both jurisdictional bar and § 1821(j) because those provisions do not address RTC in its corporate capacity. Thus, we turn to RTC's arguments as to the merits of the preliminary injunction.

We reiterate that the district court's injunction granted both monetary and nonmonetary relief against RTC in its corporate capacity. RTC argues that the injunction was improperly granted because plaintiffs did not establish irreparable harm, one of the elements necessary to obtain preliminary injunctive relief. We shall first address RTC's contention in the context of the monetary relief granted against RTC in its corporate capacity.

The primary instance of irreparable harm asserted by plaintiffs, and on which the district court relied, was plaintiffs' need for injunctive relief to preserve any damage judgment they might obtain. *See Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205 (3d Cir. 1990); *see also Fechter v. HMW Indus., Inc.*, 879 F.2d 1111, 1121 (3d Cir. 1989) (preliminary injunction necessary to preserve status quo in light of employer's distribution of assets following termination of ERISA plan). Assuming that RTC in its corporate capacity could be subject to a money judgment, no showing has been made by plaintiffs that it would be unable to satisfy such a judgment. Thus, plaintiffs have failed to show irreparable harm.

Plaintiffs argue that a finding of irreparable harm is unnecessary in light of ERISA's express recognition of statutory remedies. Plaintiffs rely on *Government of Virgin Islands, Dept. of Conservation & Cultural Affairs v. Virgin Islands Pavings, Inc.*, 714 F.2d 283, 286 (3d Cir. 1983), where this court remanded to permit the district court to grant preliminary injunctive relief without a showing of irreparable harm. That case involved a suit by the Virgin Islands to enjoin certain land uses allegedly in violation of Virgin Islands environmental laws. That case suggests that the necessity of irreparable harm in light of a statute granting courts the power to issue preliminary injunctions varies with the particular statutes involved and the relief requested. While ERISA unquestionably grants courts the power to issue preliminary injunctions, nothing in ERISA indicates that, where monetary relief is requested, the traditional requirement of irreparable harm need not be shown. We agree with the Seventh Circuit that to obtain monetary relief on a preliminary injunction, a private litigant must establish irreparable harm. *See Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1221 (7th Cir. 1989); *cf. Fechter*, 879 F.2d at 1119-21 (plaintiffs successfully established irreparable harm in ERISA action). We have already determined that plaintiffs failed to establish irreparable harm against RTC in its corporate capacity, and thus conclude that the district court, in granting monetary preliminary injunctive relief against RTC in its corporate capacity, did not exercise sound discretion.

We now turn to the nonmonetary injunctive relief granted against RTC in its corporate capacity, which prohibited termination of the plan. We need not consider

whether plaintiffs were required under ERISA to make a showing of irreparable harm to obtain this relief, because we find legal error in the granting of the injunction in this respect. *See Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1242 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984).

RTC argues that the order prohibiting termination is "overbroad" because both the plan and ERISA give plan sponsors authority to seek plan termination. PBGC agrees with RTC. Plaintiffs argue that RTC failed to raise its overbreadth argument in the district court. RTC responds that it objected to the entire order before the district court. We are persuaded to address this contention in light of RTC's broad objections before the district court.

Plaintiffs urge this court to read the district court's order to restrain only retroactive termination. We cannot so read the order. Rather, it broadly prohibits any steps to terminate. There is no basis in law for such an order. As PBGC states, "ERISA permits the administrator of a plan to initiate termination pro[c]eedings in accordance with Title IV's procedures." *See, e.g.*, 29 U.S.C. § 1341. Further, the plan at section 15.1 states that "the Board of Directors reserves the right at any time to . . . terminate the Plan. . . . " Nothing in the district court's analysis supports an order barring termination of the plan in compliance with ERISA. More than being overbroad, the order simply has no legal foundation. Where a preliminary injunction has been issued or denied based on an erroneous view of the law, it is the obligation of this court to reverse it. *See Apple Computer*, 714 F.2d at 1242. Therefore, because there was no foundation in ERISA for the district court's order barring termination, we must reverse the

district court's order against RTC in its corporate capacity for nonmonetary relief.[22] Because of our conclusion, we need not address RTC's other arguments for reversal.

III. Conclusion

The order of the district court granting a preliminary injunction will be reversed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

[22] We do not determine whether RTC in its corporate capacity had any authority which would have allowed it as such to act with respect to termination of the plan.

APPENDIX C

12 U.S.C. § 1821(d)

(3) Authority of receiver to determine claims

(A) In general

The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4)(A).

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall –

(i) promptly publish a notice to the depository institution's creditors to present their claims together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required

The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books –

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

(4) Rulemaking authority relating to determination of claims

The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(5) Procedures for determination of claims

(A) Determination period

(i) In general

Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time

The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient

The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears –

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance

If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain –

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims

The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period

(i) In general

Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions

Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if –

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims

The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(E) No judicial review of determination pursuant to subparagraph (d)

No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(F) Legal effect of filing

(i) Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6) Provision for agency review or judicial determination of claims

(A) In general

Before the end of the 60-day period beginning on the earlier of –

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) Statute of limitations

If any claimant fails to –

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7) Review of claims

(A) Administrative hearing

If any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall

consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of Title 5.

(B) Other review procedures

(i) In general

The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria

In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures

The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

(iv) Consideration of incentives

The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims

(A) Establishment required

The Corporation shall establish a procedure for expedited relief outside of the routine claims

process established under paragraph (5) for claimants who –

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period

Before the end of the 90-day period beginning on the date any claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall –

(i) determine –

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and

(ii) notify the claimant of the Determination, and if the claim is disallowed, a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) Period for filing or renewing suit

Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of –

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date the Corporation denies the claim.

(D) Statute of limitations

If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in accordance with subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) Legal effect of filing

(i) Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(9) Agreement as basis of claim

(A) Requirements

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title

shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

(B) Exception to contemporaneous execution requirement

Notwithstanding section 1823(e)(2) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

(10) Payment of claims

(A) In general

The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this chapter.

(B) Payment of dividends on claims

The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(11) Distribution of assets

(A) Subrogated claims; claims of uninsured depositors and other creditors

The receiver shall –

(i) retain for the account of the Corporation such portion of the amounts realized from any liquidation as the Corporation may be entitled to receive in connection with the subrogation of the claims of depositors; and

(ii) pay to depositors and other creditors the net amounts available for distribution to them.

(B) Distribution to shareholders of amounts remaining after payment of all other claims and expenses

In any case in which funds remain after all depositors, creditors, other claimants, and administrative expenses are paid, the receiver shall distribute such funds to the depository institution's shareholders or members together with the accounting report required under paragraph (14)(C).

(12) Suspension of legal actions

(A) In general

After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed –

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver,

in any judicial action or proceeding to which such institution is or becomes a party.

(B) Grant of stay by all courts required

Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(13) Additional rights and duties

(A) Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall –

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over –

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

Supreme Court, U.S.
FILED
NOV 4 1991
OFFICE OF THE CLERK

(2)

No. 91-298

In the Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH J. ROSA, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

GERALD L. JACOBS
General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

ROBERT D. MCGILLICUDDY
Deputy Senior Counsel

P. MATTHEW SUTKO
Senior Attorney

CHRISTOPHER J. BELLOTTO
Counsel
Resolution Trust Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

Subparagraph (i) of 12 U.S.C. 1821(d)(13)(D) (Supp. I 1989) requires exhaustion of an administrative claims procedure with respect to "any claim * * * for payment from * * * the assets of any depository institution for which the [Resolution Trust] Corporation has been appointed receiver." Subparagraph (ii) requires exhaustion with respect to "any claim relating to any act or omission of such institution or the [Resolution Trust] Corporation as receiver."

1. Does Section 1821(d)(13)(D) apply to claims arising after the Resolution Trust Corporation (RTC) was appointed receiver if those claims seek payment out of the assets of the institution for which the RTC was appointed receiver?

2. If Section 1821(d)(13)(D) requires exhaustion, did the court of appeals err in declining to fashion a judicial exception to the statutory exhaustion requirement?

3. If Section 1821(d)(13)(D) requires exhaustion, does the statute violate Article III or the Due Process Clause?

4. Does an injunction requiring the RTC as receiver of a failed institution to take specific actions that will deplete the assets of the failed institution violate 12 U.S.C. 1821(j) (Supp. I 1989), which prohibits injunctions that "restrain or affect the exercise of powers or functions of the [RTC] as * * * receiver"?

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Bowen v. *City of New York*, 476 U.S. 467 (1986)	9
Chick Kam Choo v. *Exxon Corp.*, 486 U.S. 140 (1988)	12
Coit Independence Joint Venture v. *FSLIC*, 489 U.S. 561 (1989)	8, 11, 13
Marine Cooks & Stewards v. *Panama Steamship Co.*, 362 U.S. 365 (1960)	12
PBGC v. *LTV Corp.*, 110 S. Ct. 2668 (1990)	2
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988)	10
Weinberger v. *Salfi*, 422 U.S. 749 (1975)	9
281-300 Joint Venture v. *Onion*, 938 F.2d 35 (5th Cir. 1991)	14

Constitution, statutes and regulation:

U.S. Const.:	
Art. III	6, 10
Amend. V (Due Process Clause)	6, 10, 11
Anti-Injunction Act, 28 U.S.C. 2283	12
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*	2
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 83	7
§ 501(a), 103 Stat. 369-376	7
12 U.S.C. 1441a(b) (Supp. I 1989)	7
12 U.S.C. 1441a(b)(4) (Supp. I 1989)	4
12 U.S.C. 1464(d)(6)(C)	13

Statutes and regulation—Continued: Page

12 U.S.C. 1811 (Supp. I 1989) 4
12 U.S.C. 1821 (Supp. I 1989) 4
12 U.S.C. 1821(d) (Supp. I 1989) 11
12 U.S.C. 1821(d)(2)(A)(i) (Supp. I 1989) 7, 12
12 U.S.C. 1821(d)(2)(B)(iv) (Supp. I 1989) 7, 12
12 U.S.C. 1821(d)(5)(A)(i) (Supp. I 1989) 8
12 U.S.C. 1821(d)(6)(A) (Supp. I 1989) 8
12 U.S.C. 1821(d)(12)(A)(ii) (Supp. I 1989) 11
12 U.S.C. 1821(d)(13)(D) (Supp. I 1989) 4, 5, 8, 10
12 U.S.C. 1821(d)(13)(D)(i) 9
12 U.S.C. 1821(d)(13)(D)(ii) (Supp. I 1989) 9
12 U.S.C. 1821(j) (Supp. I 1989) 4-5, 6, 11, 12, 13, 14
12 U.S.C. 1822 (Supp. I 1989) 4
12 U.S.C. 1823 (Supp. I 1989) 4
12 C.F.R. 563.47(a) (1991) 2

Miscellaneous:

H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. 1 (1989) 8
C. Wright, *Law of Federal Courts* (4th ed. 1983) 12

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-298

KENNETH J. ROSA, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-59) is reported at 938 F.2d 383. The opinion of the district court (Pet. App. 1-21) is reported at 752 F. Supp. 1231.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1991. Pet. App. 23. The petition for a writ of certiorari was filed on August 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1985, City Federal Savings Bank (City Savings I) adopted an employee pension plan, which was subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Under the terms of the Plan, the Board of Directors of City Savings I "reserve[d] the right at any time to amend, suspend or terminate the Plan . . . for any reason and without the consent of any . . . Participant [or] Beneficiary." Pet. App. 26, 52.

On December 7, 1989, the Office of Thrift Supervision (OTS) declared City Savings I insolvent and appointed the RTC to act as its receiver. On the same day, the OTS chartered a separate institution, City Savings Bank, F.S.B. (City Savings II), and appointed the RTC to act as its conservator. The next day, City Savings II purchased certain assets and assumed certain liabilities of City Savings I pursuant to a Purchase and Assumption Agreement between City Savings II and the RTC as receiver for City Savings I. Some time later, the RTC as conservator of City Savings II formally assumed the pension plan, executing amendments to that effect and notifying the Pension Benefit Guaranty Corporation (PBGC).[1] Pet. App. 3, 26-27.

The RTC determined in the summer of 1990 that the plan would cause material financial damage to City Savings II and that the decision to assume the plan accordingly violated applicable regulations.[2]

---

[1] The PBGC is a wholly owned United States government corporation that administers various aspects of Title IV of ERISA relating to the termination of pension plans. See generally *PBGC* v. *LTV Corp.*, 110 S. Ct. 2668, 2671-2672 (1990).

[2] See 12 C.F.R. 563.47(a) (1991) ("No savings association * * * shall sponsor an employee pension plan which, because

Consequently, on July 19, 1990, the RTC as conservator for City Savings II revoked the earlier assumption of the pension plan and returned the pension plan to City Savings I, for which the RTC was still receiver. On July 19, 1990, the RTC as receiver for City Savings I distributed a notice of termination to the participants and beneficiaries of the plan.[3] On September 19, 1990, pursuant to the right to terminate reserved in the plan, the RTC as receiver for City Savings I sent the PBGC formal notice of its intention to terminate the plan. Pet. App. 28-29.

Faced with continued deterioration in the value of the assets of City Savings II, the OTS on September 21, 1990 declared City Savings II insolvent, appointed the RTC as its receiver, and created a separate institution, City Savings, F.S.B. (City Savings III), for which the RTC was appointed conservator. That same day, pursuant to a Purchase and Assumption Agreement, the RTC as receiver for City Savings II transferred certain assets and liabilities to City Savings III. Pet. App. 29-30.

2. Petitioners commenced this lawsuit as a class action in the United States District Court for the District of New Jersey on November 6, 1990, seeking declaratory relief that City Savings II, City Savings III, and the RTC (in its corporate capacity, as

---

of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor.").

[3] Although the RTC as conservator of City Savings II had assumed the plan effective as of December 8, 1989, and had made the contributions to the plan required in January and April of 1990, the termination notice stated that benefits had ceased accruing as of December 7, 1989, and that the anticipated date of termination was September 20, 1990. Pet. App. 27-29.

receiver for City Savings I and City Savings II, and as conservator for City Savings III) had acted wrongfully in terminating the pension plan, injunctive relief barring retroactive termination of the plan, and an order compelling payment of all due and future plan contributions. The district court granted a preliminary injunction against City Savings II, City Savings III, and the RTC (in its various capacities), which barred any action to terminate the plan and ordered payment of all required contributions. Pet. App. 1-21.

3. The court of appeals unanimously reversed, in a detailed opinion by Judge Seitz, generally concluding that monetary claims against the two failed institutions were barred by 12 U.S.C. 1821(d)(13)(D) (Supp. I 1989),[4] because petitioners had not first presented those claims to the RTC as receiver, and that injunctive relief against the RTC as receiver and conservator were barred by 12 U.S.C. 1821(j)

---

[4] Section 1821(d)(13)(D) provides:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

Pursuant to Section 1811, references to "the Corporation" in Chapter 16 of Title 12 generally refer to the Federal Deposit Insurance Corporation, but pursuant to 12 U.S.C. 1441a(b)(4) (Supp. I 1989), the RTC has the same powers as 12 U.S.C. 1821, 1822, and 1823 (Supp. I 1989) grant to the FDIC. See Pet. App. 33 n.10.

(Supp. I 1989),[5] because the relief would affect the RTC's exercise of its authority as receiver. Pet. App. 22-59.

a. Petitioners contended that Section 1821(d)(13)(D) requires exhaustion only with respect to claims that arise before the institution fails; accordingly, because petitioners' claims against those institutions arose out of actions taken after the RTC was appointed receiver for the relevant institutions, petitioners contended that they could sue in district court without first submitting their claims to the RTC's administrative claims procedure. With respect to monetary claims against the RTC as receiver of City Savings I and City Savings II, the court of appeals rejected this argument, noting that the language of the statute applies to all claims against "any depository institution for which the [RTC] has been appointed receiver." Because the claims in question were against City Savings I and City Savings II, and because at the time the lawsuit commenced the RTC had been appointed a receiver for both of those institutions, the court of appeals concluded that these claims fell within 12 U.S.C. 1821(d)(13)(D) (Supp. I 1989). Pet. App. 36-37.

b. The court of appeals also rejected petitioners' contention that they should not be required to exhaust the administrative claims process because exhaustion would be futile. The court noted that, whatever position the RTC had taken in the litigation, the receiver

---

[5] 12 U.S.C. 1821(j) (Supp. I 1989) reads:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

nevertheless might choose to allow the claim to avoid future litigation, a decision that would moot the controversy. Pet. App. 44. The court also rejected PBGC's argument that exhaustion should not be required on legal issues arising under ERISA, because the RTC has no particular expertise on such questions. The court explained that "[t]he primary purpose underlying FIRREA's exhaustion scheme is to allow RTC to perform its statutory function of promptly determining claims so as to quickly and efficiently resolve claims against a failed institution without resorting to litigation." Pet. App. 46a. Given this limited purpose, and the limited duration of the administrative claims process, the court concluded that it would be inappropriate to fashion a judicial exception. *Ibid.*

c. The court of appeals also rejected petitioners' argument that it would violate Article III or the Due Process Clause of the Fifth Amendment to require petitioners to exhaust their claims before the RTC. The court noted that petitioners were "not deprived in any way of access to an Article III court, but at most suffer a relatively slight delay to permit a receiver to determine whether to allow their claims." Pet. App. 47. Because the statute provides for *de novo* review by the district court, the court of appeals concluded that there is nothing inappropriate in allowing the RTC to make a preliminary determination. *Id.* at 47-48.

d. The court of appeals also rejected petitioners' contention that the anti-injunction provision set forth in 12 U.S.C. 1821(j) (Supp. I 1989) did not bar the nonmonetary relief granted by the district court because the challenged actions were beyond the scope of the RTC's authority as receiver. The court of appeals first addressed the portion of the injunction

that would require the RTC as conservator of City Savings III to expend assets of that institution to make contributions to the pension plan. The court of appeals believed that a decision not to make monetary payments clearly fell within the scope of the RTC's authority under Section 1821(d)(2)(B)(iv), which authorizes the RTC to "preserve and conserve the assets and property of [the failed] institution." The court then turned to the portion of the injunction that prohibited the RTC as receiver of City Savings I and City Savings II from taking any action to terminate the plan. The court of appeals concluded that this action fell within the scope of the RTC's authority as receiver because City Savings I had a contractual right to terminate the plan, see page 2, *supra*, and because the RTC as receiver succeeded to all contractual rights of City Savings I, see 12 U.S.C. 1821(d)(2)(A)(i) (Supp. I 1989). Pet. App. 51-53.

ARGUMENT

The decision of the court of appeals rests upon the application of explicit provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 83, to the facts of this case and does not conflict with any decision of this Court or another court of appeals.

1. The establishment of the RTC was one of the principal steps taken in FIRREA to redress the savings and loan crisis. See FIRREA Section 501(a), 103 Stat. 369-376, adding 12 U.S.C. 1441a(b) (Supp. I 1989). To give the RTC adequate time to deal with the mass of claims against the failed institutions for which it would become receiver, Congress established a claims procedure. Any person wishing to pursue claims against a failed institution or the RTC as re-

ceiver of such an institution first must present those claims to the RTC to give it an opportunity to resolve the claim without litigation. The statute obligates the RTC to decide to allow or disallow the claims within 180 days. 12 U.S.C. 1821(d)(5)(A)(i) (Supp. I 1989). At the conclusion of the 180-day period (or earlier, if the RTC acts earlier), the claimant may file an action in a federal district court seeking a *de novo* determination of the claim, even if the RTC has not yet made a ruling on its claim. Section 1821(d)(6)(A); see Pet. App. 34 n.11. To give the claims procedure substance, Section 1821(d)(13)(D) divests courts of jurisdiction over claims for payment from the assets of a failed institution for which the RTC has been appointed receiver other than in accordance with the claims procedure. In sum, because all claimants retain a right to seek *de novo* review of their claim in federal court, the sole substantive effect of the claims procedure is to defer decision of the claims for a 180-day period so that the RTC will have a chance to evaluate the claims and forestall unnecessary litigation.[6]

Petitioners contend (Pet. 16-19) that the statutory exhaustion requirement set forth in Section 1821(d)(13)(D) does not apply to their claims because their claims arise out of events that occurred after City Savings I failed. As the court of appeals explained (Pet. App. 36-37), this argument is inconsistent with the

---

[6] The procedures were designed by Congress in response to this Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), which held that claimants were not required to exhaust their claims in claim procedures adopted by FSLIC, largely because of the indefinite duration of the FSLIC procedures. See *Coit*, 489 U.S. at 584-586; H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. 1, at 418-419 (1989).

plain language of Section 1821(d)(13)(D)(i), which applies to any claim for payment from the assets of the failed institution. Moreover, this argument is inconsistent with the clear import of Section 1821(d)(13)(D)(ii), which applies to claims "relating to any act or omission of * * * the Corporation as receiver." Because any such claim necessarily would arise out of events that occur after the institution failed, petitioner's argument essentially attempts to read this subsection out of the statute. The court of appeals correctly rejected petitioner's contention.

2. Petitioners next argue (Pet. 19-24) that, even if the statute requires exhaustion, the federal courts should create a judicial exception to the exhaustion requirement. But such judicial exceptions to a statutory exhaustion requirement can be recognized only where necessary to implement congressional intent. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975) (noting that "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue"). Here, the court of appeals properly found (Pet. App. 46) that any such exception would defeat the entire purpose of the exhaustion scheme set forth in FIRREA: to enable the RTC to resolve claims in advance of litigation, thus decreasing the litigation burden of the RTC's myriad receiverships and the accompanying expense of resolving these claims.

Petitioners rely heavily (Pet. 19-20) on *Bowen* v. *City of New York*, 476 U.S. 467, 485 (1986), in which this Court excused compliance with a statutory exhaustion requirement in the Social Security Act; petitioners suggest that *Bowen* established a general rule that exhaustion is not required where the agency conduct is inconsistent with governing law.

But this dramatically overreads *Bowen*; a rule waiving exhaustion in any case where the agency decision is incorrect would completely defeat the purpose of the exhaustion requirement. As this Court has explained, *Bowen* was a narrow decision that waived exhaustion to allow the claimants to challenge "a secret, internal policy." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 123 (1988). In this case as in *Sebben*, the agency action will "not [be] taken pursuant to a secret, internal policy * * *. If [petitioners] wis[h] to challenge it they should [do] so when their cases [are] decided." *Ibid.*

Similarly, petitioners err in relying (Pet. 21-22) on cases in which exhaustion was waived because the remedy sought by the claimant was not available before the agency. As the court of appeals noted, the only claims petitioners were required to exhaust sought monetary relief, which the receiver is authorized to grant. To the extent petitioners' complaint is that the receiver is unlikely to have sufficient funds to satisfy their claims, their predicament is caused not by the claims procedure but by their misfortune in holding claims against a failed depository institution.

In sum, petitioners have advanced no argument that would justify a court in fashioning an exception to the specifically articulated exhaustion requirement set forth in 12 U.S.C. 1821(d)(13)(D) (Supp. I 1989), and cannot suggest that any court has concluded that such an exception would be appropriate. This claim merits no further review.

3. Petitioners also contend (Pet. 24-27) that the statutory exhaustion procedure violates Article III and the Due Process Clause of the Fifth Amendment because it requires them to submit their claim to a biased decisionmaker. As the court of appeals recognized (Pet. App. 46-48), this claim is meritless.

Nothing in the claims procedure need have the slightest effect on any aspect of the judicial disposition of petitioners' claims except the timing, because the RTC's decision to allow or disallow the claim is not entitled to deference from the district court. The Due Process Clause clearly would permit a statute staying all actions against the RTC for a 180-day period. Cf. 12 U.S.C. 1821(d)(12)(A)(ii) (Supp. I 1989) (granting the RTC a statutory right to a 90-day stay in any case pending against an institution for which it becomes a receiver). There is no significant difference between that statute and the provisions of Section 1821(d) that petitioner challenges, which simply provide for a 180-day period during which the RTC has an opportunity to make a nonbinding determination regarding claims against assets under its supervision. See *Coit*, 489 U.S. at 587 (acknowledging that FSLIC might have had an inherent conflict of interest with claimants who were competing creditors, but nevertheless suggesting that claimants could be required to submit their claims to FSLIC for consideration before going to court).

4. Petitioners also contend (Pet. 11-16) that the court of appeals erred in its application of the anti-injunction provisions of Section 1821(j). The court invalidated an injunction that would have required the RTC as receiver of the failed institutions to continue making contributions to the pension plan, and that would have prohibited the RTC from taking any actions to terminate that plan. In particular, petitioners renew their contention that the RTC's actions with respect to the plan are beyond the capacity of the RTC as receiver. For the reasons articulated by the court of appeals (Pet. App. 48-55), this contention is meritless. The injunction would have required the RTC immediately to make specified expenditures from the assets of the failed institutions, and would

have barred it from exercising the contractual right of City Savings I to terminate the pension plan. The RTC's decision not to make those expenditures and instead to terminate its obligations under the plan—an action that in substance placed petitioners on the same footing as other creditors—unquestionably is within the scope of the RTC's authority as a receiver. See 12 U.S.C. 1821(d)(2)(A)(i) and (B)(iv) (Supp. I 1989). Such an injunction clearly would "restrain or affect the exercise of powers or functions of the [RTC] as a * * * receiver." The court of appeals thus correctly determined that the district court erred in issuing the challenged injunction.

Petitioners' basic contention on this point seems to be that ERISA prohibits the type of retroactive plan termination contemplated by the RTC in this case; in their view, Section 1821(j) should not bar an injunction that would prohibit an act that violated federal law. See Pet. 11-12. But such an interpretation would drain Section 1821(j) of force in all but the most insignificant of cases. Federal courts never enter injunctions except in cases where they have determined that the action to be enjoined contravenes established legal principles. The very point of an anti-injunction provision is to prevent courts from enjoining actions, even if those actions violate otherwise operative legal principles.[7] The court of appeals correctly rejected this argument.

---

[7] Compare *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 149 (1988) (noting that the Anti-Injunction Act bars an injunction "even when the interference [with a protected federal right] is unmistakably clear"); *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, 371 (1960); C. Wright, *Law of Federal Courts* § 47, at 281 (4th ed. 1983) (rejecting decisions that held that the Anti-Injunction Act, 28 U.S.C. 2283, does not bar injunctions "necessary to prevent grave and irreparable injury"; explaining that "with or with-

Petitioners err in their contention (Pet. 13-14) that the court of appeals' interpretation of Section 1821(j) is inconsistent with this Court's interpretation of a similar provision in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989). In *Coit*, this Court concluded that identical language in 12 U.S.C. 1464(d)(6)(C) did not divest the federal courts of subject-matter jurisdiction to adjudicate claims, because applicable law had not granted FSLIC the authority to adjudicate the claims of creditors against failed institutions. *Coit*, 489 U.S. at 574-575. *Coit* simply stands for the proposition that Section 1821(j) does not bar an injunction against actions—such as adjudication by FSLIC of the claims of creditors—that by their very nature were beyond the scope of the receivership as constituted by Congress. The *Coit* opinion cannot fairly be read to support petitioners' novel claim that Section 1821(j) permits any injunction that rests on a determination that the challenged action is incorrect under some other federal law; as discussed above, such a reading of Section 1821(j) would drain it of all force. Whatever the merits of petitioners' interpretation of ERISA, the actions involved here—operation of an institution and disposition of its assets—clearly fall within the scope of the power to conduct a receivership Congress bestowed on the RTC in FIRREA. Accordingly, the analysis in *Coit* supports the court of appeals' conclusion that Section 1821(j) bars the injunction at issue here.[8]

---

out § 2283, injunctions cannot issue save to prevent irreparable injury, and there would be no point in the statute if it meant no more than this").

[8] Petitioners also contend (Pet. 14-15) that the decision of the court of appeals conflicts with the decision of the Fifth

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

GERALD L. JACOBS
General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

ROBERT D. MCGILLICUDDY
Deputy Senior Counsel

P. MATTHEW SUTKO
Senior Attorney

CHRISTOPHER J. BELLOTTO
Counsel
Resolution Trust Corporation

NOVEMBER 1991

Circuit in *281-300 Joint Venture* v. *Onion*, 938 F.2d 35 (1991). In that case, the Fifth Circuit noted that the RTC had the power to conduct a foreclosure sale in the course of a clearly correct holding that Section 1821(j) barred an injunction that would have prevented the RTC from conducting a foreclosure sale. *Id.* at 39. Thus, *Onion* is a fact-specific application of the analysis set forth in *Coit*; nothing in the opinion in that case supports petitioners' contention that Section 1821(j) allows an injunction in any case in which the federal court determines that the challenged action is inappropriate.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45144